

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 88

THOMAS D. CLANCY, ET AL., PETITIONERS,

vs.

UNITED STATES.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

**PETITION FOR CERTIORARI FILED MAY 13, 1960
CERTIORARI GRANTED JUNE 27, 1960**

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

No. 12815.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

THOMAS D. CLANCY, JAMES F. PRINDABLE
and **DONALD KASTNER,**
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Illinois,
Honorable William G. Juergens, Presiding.

APPELLANTS' APPENDIX.

SUMMARY STATEMENT UNDER RULE 16:

On May 6th, 1957 an affidavit of Glenwood Johnson, Special Agent of the Internal Revenue Service, was filed in the United States District Court for the Eastern District of Illinois and was styled as follows: United States of America vs. the entire second floor consisting of one or more rooms and their location being to deponent unknown,

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Summary Statement Under Rule 16

of the West $\frac{1}{2}$ of a two story red brick building located on the Southeast corner of State Street and North 23rd Street in the City of East St. Louis, Illinois, such second floor being over a first floor in which a business is and has been operated under the name, style and description of "Zittel's Tavern," and was numbered case No. 18768. A similar and separate affidavit was also filed for a search warrant for the first floor of said premises. On May 5th, 1957, the Honorable William G. Juergens, U. S. District Judge, issued search warrants pursuant to said requests contained in said affidavits. The property seized under authority of said search warrant was then listed on the returns of the search warrants and filed in the District Court on May 13th, 1957. Subsequently the documents obtained by means of said search warrant for the second floor premises, or information obtained from said documents were presented to a grand jury then sitting in the Eastern District of Illinois and, on July 25, 1957, an Indictment was returned against the defendants-appellants charging them with violations of: Section 1001, Title 18, United States Code; Section 7201, Title 26, United States Code; Section 371, Title 18, United States Code, to which the defendants-appellants pleaded not guilty on July 30, 1957, and on August 14, 1957, defendants-appellants filed Motions to Dismiss the Indictment. In conjunction with said Motions to Dismiss Indictment, they filed appropriate Motions for Return of Property and to Suppress Evidence seized by search warrant issued in Case No. 18768, which were proceedings for the issuance of a search warrant for the entire first floor of the building located on the Southeast corner of 23rd and State Street, East St. Louis, Illinois, and the entire second floor of a building located on the Southeast corner of 23rd and State Street in East St. Louis, Illinois. On August 14, 1957, defendants-appellants also filed a Motion to Inspect the Transcript of Evidence and the Record

Summary Statement Under Rule 16

of the Foreman of the Grand Jury. On September 16, 1957, the defendants-appellants filed an Affidavit in Support of the Motion for Return of Property and to Suppress Evidence. On March 27, 1958, the United States Attorney filed a Motion to Change Numbers on the search warrant issued for the second floor premises, and an order was entered allowing said motion the same day, and the transfer of certain documents in that case, to the file in this case.

On March 27, 1958, the United States and the Defendants filed a stipulation as to certain facts concerning the motions heretofore filed by the defendants, and also with respect to Exhibits A, B, and C which were attached to defendants-appellants brief previously filed. On July 28, 1958, the court entered an order denying all three motions together with a memorandum opinion.

Subsequently, a Motion to Dismiss, a Motion for Bill of Particulars, and a Motion to Produce List of Jurors and Witnesses, were filed on April 24, 1959 and were also denied by the court on May 5, 1959. On May 8, 1959, the defendants-appellants filed an Amended Motion to Dismiss with affidavit of the Jury Commissioner attached, attacking the manner and selection of the Grand and Petit Jury, which Motion was also denied by the court.

The case was tried before a Jury commencing on Monday, May 11, 1959, and concluding on May 14, 1959. Each of the defendants filed a Motion for Acquittal on May 13, 1959 at the close of Government's case. These motions were denied the same day by the court.

On May 14, 1959, the court also entered an order denying defendants' Amended Motion to Dismiss and filed a memorandum opinion relative thereto.

The jury returned a verdict finding the defendant-appellant, Thomas D. Clancy, guilty of Counts I, IV and V.

Summary Statement Under Rule 16

of the indictment; and found the defendant-appellant, James F. Prindable, guilty of Counts III, IV and V of the Indictment; and found the defendant-appellant, Donald Kastner, guilty of Counts IV and V of the Indictment; and also found the defendant-appellant, Donald Kastner, not guilty of Count II of the Indictment.

Motions for Judgment of Acquittal Notwithstanding the Verdict, and Motions for New Trial were filed May 22, 1959 and were denied by the Court on July 7, 1959. Each of the defendants-appellants then filed a Motion to Suspend Imposition of Sentence and to Admit them to Probation on July 15, 1959, which motions the court overruled and entered judgment and sentence against the defendants-appellants on July 22, 1959. Whereupon the defendants-appellants filed their Notice of Appeal on July 31, 1959, and from this judgment and sentence, these defendants-appellants appeal to this court.

On August 18, 1959, the defendants-appellants filed a Motion to Extend the Time for Filing Record on Appeal, and on August 21, 1959, the court entered an order extending the time for filing the record on appeal to and including October 29, 1959. On August 18, 1959, the Government and the attorneys for the defendants-appellants entered a stipulation designating the contents of the record on appeal to include all original papers filed in this cause and a complete transcript of all testimony taken either during the trial or during hearing on motions filed in this cause, except all memoranda of law filed by either counsel for the United States or counsel for the defendants-appellants.

Affidavit for Search Warrant

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A-4 AFFIDAVIT FOR SEARCH WARRANT.

(Filed May 6, 1957, Clerk, U. S. District Court,
Eastern District of Illinois.)

In the United States District Court,
Eastern District of Illinois.

United States of America

v.

The entire second floor consisting of one or more rooms, the number of rooms and their location being to deponent unknown, of the west one-half of a two story red brick building located on the Southeast corner of State Street and North 23rd Street in the City of East St. Louis, Illinois, such second floor being over a first floor in which a business is and has been operated under the name, style and description of "Zittel's Tavern".

Docket No.
Case No. 18768.

Affidavit for Search Warrant.

Before Honorable William G. Juergens, Judge, United States District Court, Post Office Building, East St. Louis, Illinois:

The undersigned, being duly sworn, doth depose and say he is and has been for more than the one year last past a duly qualified, appointed and authorized Special Agent of the Intelligence Division of the Internal Revenue Service of the United States; that he is positive that the premises described as follows, to wit:

Affidavit for Search Warrant

The entire second floor consisting of one or more rooms, the number of rooms and their location being to deponent unknown, of the west one-half of a two story red brick building located on the Southeast corner of State Street and North 23rd Street in the City of East St. Louis, Illinois, such second floor being over a first floor in which a business is and has been operated under the name, style and description of "Zittel's Tavern".

A-5 have been and are being used in the conduct and carrying on of a "Wagering Business", and there is now being concealed certain property, namely, divers records, to wit, books, memoranda, tickets, pads, tablets, and papers recording the receipt of money from and the money paid out in connection with the operation of said wagering business on said premises, and designed and intended for use and which have been and are now being used as a means of committing divers criminal offenses against the laws of the United States, that is to say, the offense of wilfully attempting to evade and defeat a tax imposed by the Internal Revenue laws of the United States and the payment thereof, to wit, the special tax of \$50 a year to be paid by each person engaged in the business of accepting wagers, and each person engaged in receiving wagers for or on behalf of any person so liable, for the fiscal year ending June 30, 1957, under the provisions of Section 4411 of the Internal Revenue Code of 1954, in violation of Section 7201 of said Code (Section 7201, Title 26, U. S. C. A.); and the offense of wilfully failing to prepare and file with the District Director of Internal Revenue at Springfield, Illinois, the Special Tax Return and Application for Registry—Wagering (Form 11-C) for the fiscal year ending June 30, 1957, in the name of the operator of said business, namely, one John Doe, under the provisions of Section 4412 of the Internal Revenue Code of 1954 in violation of Section 7203 of said Code (Section 7203, Title 26,

Affidavit for Search Warrant

U. S. C. A.), and that there has been and is now concealed in said premises certain other property used, designed and intended for the uses aforesaid, to wit, files, desks, tables and receptacles, the description of which is to affiant unknown, for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, telephones for the receipts of wagers and the receipt of information concerning horse races and other sporting contests, and divers receptacles in the nature of envelopes in which there is kept money won by patrons who have won wagers or bets made at said place of business, and divers other tools, implements, apparatus and records designed and used for the purposes aforesaid.

Deponent further states that the facts tending to establish the foregoing grounds for the issuance of a search warrant for said premises are as follows:

That he is a Special Agent of the Intelligence Division of the Internal Revenue Service of the United States; A-6 that as such, he placed wagers on horse races on two occasions during the months of March and April, 1957, with a man known to him as "Heine" at said "Zittel's Tavern":

Deponent further states that said wagers were placed by giving to said "Heine" a slip of paper on which deponent had written the names of horses, race tracks, and sums of money substantially similar to the following wager placed on April 24, 1957:

King Hiram, \$2.00 to win, \$1 to place in the 7th race at Jamaica.

Towson Town, \$2.00 to win, \$1 to place in the 8th race at Jamaica.

Deponent states further that he placed a wager with a man known to him as "Murphy", the bartender at said "Zittel's Tavern", on April 29, 1957, as follows:

Affidavit for Search Warrant

Jutland, \$2.00 to win, \$1.00 to place in the 7th race at Jamaica.

St. Francis \$1.00 to win, \$1.00 to place in the 8th race at Jamaica.

Deponent states further that he entered "Zittel's Tavern" at about 10:40 a. m., on March 20, 1957, and observed the woman, who deponent knows drives a Plymouth Station Wagon, enter the tavern at about 10:45 a. m., speak to "Heine", and give to said "Heine" money envelopes, racing form and scratch sheet, whereupon said "Heine" walked to a doorway behind the bar on the northeast side of the tavern room which leads upstairs over the men's toilet, place said envelopes in a stairwell areaway and close the door.

Deponent states further that he waited a short period of time, and then stated to said "Heine" that he had an envelope coming, whereupon said "Heine" returned to the door, opened it, picked up an envelope which he gave to deponent which had the amount of \$9.60 written on it, which represented the winnings on a wager placed by deponent on a prior occasion.

Deponent states further that on April 12, 1957, at approximately 11:05 a. m., Special Agent Norman J. Mueller was in said Zittel's Tavern and observed a man carrying a canvas sack similar to sacks furnished by banks to carry money, enter the tavern from the entrance on 23rd Street, speak to Murphy, the bartender, and whom Murphy called Tim or Jim, go behind the bar through a door on the northeast side of the tavern which leads upstairs.

Deponent states further that he has observed considerable activity in and around said Zittel's Tavern between 6:00 a. m. and 7:30 a. m. on several occasions.

Deponent further states that on at least two occasions when he was in Pohlman's News Co., 307 N. 5th Street, East

Affidavit for Search Warrant

St. Louis, placing wagers on horse races he heard Otto Pohlman call wagers in to a man that he called Jim.

A-7 Deponent further states that Special Agent Wm. L. Edwards, Jr., on or about May 1, 1957, observed a man known to him as Charles Kastner, a well known bookmaker, dressed in dark trousers and green sport shirt, enter the premises of Zittel's Tavern at about 7:09 a. m., and shortly thereafter saw Internal Revenue Agent W. F. Ryan enter said premises.

Deponent further states that Special Agent Donald B. Yerly on or about May 1, 1957, observed a man known to him as Charles J. Kastner, well known bookmaker in East St. Louis, enter the premises of Zittel's Tavern at about 7:09 a. m., and shortly thereafter at about 7:17 a. m., saw a man known to him as James Prindable, well known bookmaker in East St. Louis, enter said Zittel's Tavern.

Deponent states further that Special Agents Yerly and Edwards examined the original Special Tax Return and Application for Registry—Wagering (Form 41-C), filed by said Kastner and Prindable on May 2, 1957.

Deponent further states that at a little after 7:00 a. m., on May 1, 1957, Internal Revenue Agent W. F. Ryan entered said premises at Zittel's Tavern, and that said Internal Revenue Agent observed the man who was later identified to him as James F. Prindable enter said Zittel's Tavern and that said James F. Prindable went behind the bar and through the doorway on the northeast side of the tavern to the stairway which leads upstairs.

Deponent further states that on May 2, 1957, Special Agent Allan J. Busch examined a transcript he had made of the telephone toll call records concerning the telephone listed as Dickens 4-9846 which is subscribed to by the Wm. Blaha Tavern, Collinsville, Illinois, and those records disclosed that during the period August 11, 1956, to January

Affidavit for Search Warrant

25, 1957, twenty-one telephone calls were made from that number to a number listed as BRidge 1-0448 which is a telephone subscribed to by a John Leppy, 2300A State Street, East St. Louis, Illinois.

Deponent further states that on April 16, 1957, Internal Revenue Agent W. L. Buescher interviewed Mr. Cyril Bugger and Richard Pomatot, well known bookmakers in Collinsville, Illinois, who filed a Special Tax Return and Application for Registry—Wagering (Form 11-C), for the fiscal year ending June 30, 1957. Return was examined by said W. L. Buescher on April 16, 1957, during an interview with said Cyril Bugger and Richard Pomatot. During that interview Mr. Bugger and Mr. Pomatot stated that they picked up horse bets at Blaha's Tavern and that their telephone bets were ordinarily received at Blaha's Tavern.

The Blaha Tavern referred to by Mr. Bugger and Mr. Pomatot is the same Blaha Tavern referred to by Special Agent Busch.

A-8 Deponent further states that at the time of the foregoing transactions, he observed on bar, back bar, under the bar, on tables in the southwest room, and in the stairwell, and in the safe paraphernalia commonly used in the operation of a wagering business involving the taking of bets on horse races, namely, scratch sheets, racing forms, United States Currency, and small pads of paper, about 4 x 6 inches in dimension.

Deponent further states that in the premises hereinabove described, divers criminal offenses against the laws of the United States, in violation of Sections 7201 and 7203 of said Code (Sections 7201, 7203, Title 26, U. S. C. A.) have been committed and from personal observation has reason to believe are being committed, as is fully set forth in paragraph 1 of this affidavit, in manner and form as

Affidavit for Search Warrant

therein set forth. This statement is based in part upon the facts within the personal knowledge of this deponent as hereinabove set forth, and in part upon the facts set forth in the affidavits of Joseph M. Heckelbech, Chief, Collection Division of the Internal Revenue Service in the Office of the District Director of Internal Revenue at Springfield, Illinois, Special Agents Norman J. Mueller, Donald B. Yerly, Allan J. Busch, W. E. Edwards of the Intelligence Division, East St. Louis, Internal Revenue Agents W. F. Ryan and W. L. Buscher, which affidavits are appended hereto and by this reference thereto made a part hereof.

Wherefore your deponent prays that a search warrant may issue to any Special Agent of the Intelligence Division of the Internal Revenue Service, authorizing him to enter in the daytime, with the proper assistance, to the above named premises, and there search for and seize and take into his possession all tools, implements, apparatus, United States Currency and records designed and used in the conduct and carrying on of a "Wagering Business" found on said premises, to the end that the same may be dealt with according to law.

Glenwood Johnson,
Special Agent,
Internal Revenue Service
as Aforesaid.

Subscribed and sworn to before me this 5th day of May,
1957.

William G. Juergens,
U. S. District Judge.

A-9 In the United States District Court
 Eastern District of Illinois.

The undersigned, Joseph M. Heckelbech, being first duly sworn, doth depose and say that he is employed in

Affidavit for Search Warrant

the Internal Revenue Service of the United States, and is and has been for more than the year last past the Chief of the Collection Division in the office of the District Director of Internal Revenue at Springfield, Illinois, in which capacity he has full custody, control, access to and the duty of preserving, supervising the preparation of, and the making use of the records in said office having reference to returns for taxing purposes of operators of places of business and premises in said Internal Revenue District where persons are engaged in the business of accepting wagers, or persons are engaged in receiving wagers for or on behalf of others; the records of the imposition and assessment of such taxes, including the special tax of \$50 a year, to be paid by each person engaged in the business of accepting wagers, and each person engaged in receiving wagers for or on behalf of any person so liable, imposed under the provisions of Section 4411 of the Internal Revenue Code of 1954 (Sec. 4411, Title 26, U. S. C. A.); information with respect to records maintained by persons liable to the imposition and assessment of such taxes; records of such information as has been supplied to the office of said District Director by persons subject to the imposition and assessment of such taxes; records of the collection of such taxes and records of the payment of such taxes.

Deponent further states that he has carefully examined all of said records covering the fiscal year ending June 30, 1957, and knows the contents thereof, and states that there is no record in said office for said fiscal year of a return having been filed by the operator of the A-10 place of business carried on in part in the premises known as 2300A State Street, East St. Louis, Illinois, covering John Lippy, Henry D. Zittel or any other person engaged in the business of accepting wagers or engaged in receiving wagers for or on behalf of any other

Affidavit for Search Warrant

person in said premises or any part of said premises; that there is no record for said fiscal year in said office having reference to the records kept and maintained by any person engaged in the business of accepting wagers or engaged in receiving wagers for or on behalf of any other person in said premises; no record of any information furnished to said District Director by any such person engaged in the business of accepting wagers or engaged in receiving wagers for or on behalf of any other person in said premises; no record of the collection of a tax therefor as required by said Code and regulations; no record of the payment of a tax therefor as required by said Code and said regulations.

And deponent further states that there are no other records for said fiscal year in the office of said District Director having reference to said special taxes imposed under the provisions of said Section 4411 and the payment thereof by reason of the business and operations carried on in the aforesaid premises.

Jos. M. Heekelbech,
Chief, Collection Division,
Office of the District Director
of Internal Revenue,
Springfield, Illinois.

Subscribed and sworn to before me this 2nd day of May,
1957.

William G. Juergens,
U. S. District Judge.

Subscribed and sworn to before me this 2nd day of
May, 1957.

G. W. Schwaner, Clerk,
United States District Court.

Affidavit for Search Warrant

A-11 I, Norman J. Mueller, being of legal age, state:

I am and have been for the past year, a duly qualified, appointed and authorized Special Agent of the Intelligence Division of the Internal Revenue Service.

On April 12, 1957, at approximately 11:05 a. m., I was in Zittel's Tavern, 2300 State Street, East St. Louis, Illinois, and I observed a man carrying a canvas sack similar to sacks furnished by banks to carry money, enter the tavern from an entrance on 23rd Street, speak to Murphy, the bartender, and whom Murphy called "Tim" or "Jim", go behind the bar and through a door on the northeast side of the tavern which leads upstairs.

Norman J. Mueller,
Special Agent,
Internal Revenue Service,
as Aforesaid.

Subscribed and sworn to before me this 3rd day of May, 1957.

William G. Juergens,
U. S. District Judge.

A-12 The undersigned, being duly sworn, doth depose and say he is and has been for more than the one year last past a duly qualified, appointed, and authorized Special Agent of the Intelligence Division of the Internal Revenue Service of the United States.

That on or about May 1, 1957, at approximately 7:07 a. m. deponent personally observed a 1955 Blue and White Plaza 2-door Plymouth Station Wagon, Illinois License No. 867-679, drive up and park on the south side of State Street near the intersection of State Street and 24th Street, that deponent personally observed a man known to him as Charles J. Kastner, Jr., a well known bookmaker, leave

Affidavit for Search Warrant 1

the said automobile, walk to the corner of State Street and 23rd Street, and engage an unknown individual in conversation, and subsequently enter the premises of Zittel's Tavern, 2300 State Street, at approximately 7:09 a. m., that said Charles J. Kastner, Jr., was wearing dark trousers, a light green sport shirt, with grey hair, approximately 5' 8" in height, 150 pounds in weight, who appeared to be approximately 45 to 50 years of age.

That at approximately 7:17 a. m. on the date as aforesaid deponent personally observed a Black Buick (Illinois License No. 867-680) drive up and park directly behind the Plymouth Station Wagon as aforesaid, that a man known to him as James F. Prindable, a well known bookmaker, left the said automobile, walked to and entered the premises of Zittel's Tavern, as aforesaid, at approximately 7:18 a. m., that said James F. Prindable was approximately 5' 10" in height, 165 pounds in weight, short brown hair, pale complexion, with dark shell-rimmed glasses, wearing a light blue shirt and dark blue pants.

A-13 That on or about May 2, 1957, deponent personally examined a Special Tax Return and Application for Registry—Wagering (Form 11-C) filed by the aforesaid Charles J. Kastner, Jr., and James F. Prindable on June 29, 1957, which stated thereon that their business address was 2401 Ridge Avenue, East St. Louis, Illinois.

Donald B. Yerly,
Special Agent,
Internal Revenue Service
as Aforesaid.

Subscribed and sworn to before me this 5th day of May,
1957.

William G. Juergens,
U. S. District Judge.

Affidavit for Search Warrant

A-14 I, Allan J. Bush, being of legal age, state:

3 AJB

On May 4, 1957, I examined a transcript of the telephone toll call records pertaining to the telephone number Dickens 4-9846 subscribed to by the Wm. Blaha Tavern, Collinsville, Illinois, made from the official records of the Illinois Bell Telephone Company, Collinsville, Illinois, and found that during the period August 11, 1956, to January 25, 1957, twenty-one (21) telephone calls were made between Dickens 4-9846 and Bridge 1-0448, which is a telephone subscribed to by John Leppy, 2300A State Street, East St. Louis, Illinois.

Allan J. Busch,
Special Agent,
Internal Revenue Service
as Aforesaid.

Subscribed and sworn to before me this 3rd day of May, 1957.

William G. Juergens,
U. S. District Judge.

A-15 The undersigned, being duly sworn, doth depose and say he is and has been for more than the one year last past a duly qualified, appointed, and authorized Special Agent of the Intelligence Division of the Internal Revenue Service of the United States.

That on or about May 1, 1957, at approximately 7:09 a. m., deponent personally observed a man known to him as Charles J. Kastner, Jr., a well known bookmaker, dressed in dark trousers, light green sport shirt, and hat, enter the premises of Zittel's Tavern, 2300 State Street, East St. Louis, Illinois.

Affidavit for Search Warrant

That shortly thereafter an Internal Revenue Agent personally known to me as W. F. Ryan entered the premises of Zittel's Tavern as aforesaid from the side door leading from 23rd Street.

That on or about May 2, 1957, deponent personally examined a Special Tax Return and Application for Registry—Wagering (Form 11-C) filed by the aforesaid Charles J. Kastner on June 29, 1957, which stated thereon that their business address was 2401 Ridge Avenue, East St. Louis, Illinois.

Wm. E. Edwards, Jr.,
Special Agent,
Internal Revenue Service,
as Aforesaid.

Subscribed and sworn to before me this 5th day of May, 1957

William G. Juergens,
U. S. District Judge.

A-16 I, William F. Ryan, being of legal age state:

I am and have been for the past year, a duly qualified, appointed, and authorized Internal Revenue Agent of the United States Internal Revenue Service.

On May 1, 1957, at a little after 7:00 a. m., I entered Zittel's Tavern located at 2300 State Street, East St. Louis, Illinois; that shortly after entering the premises I observed a man about 40 years of age, dark hair, cut short, wearing dark blue pants and a dark blue shirt, enter the tavern, walk to the end of the bar, went behind the bar and walked to the front of the bar, opened and went through a door on the northeast side of the tavern to an areaway which leads upstairs. This man was later identified to me as James F. Prindable, a well known book-

Affidavit for Search Warrant

maker in East St. Louis, by Special Agent Wm. L. Edwards, Jr., of East St. Louis.

William F. Ryan,
Internal Revenue Agent,
Internal Revenue Service,
as Aforesaid.

Subscribed and sworn to before me this 3rd day of May, 1957.

William G. Juergens,
U. S. District Judge.

A-17 I, W. L. Buescher, being of legal age state:

I am and have been for the past year, a duly qualified, appointed and authorized Internal Revenue Agent of the United States Internal Revenue Service.

That on April 16, 1957, I interviewed Mr. Cyril Bugger and Richard Pomatot, well known bookmakers in Collinsville, Illinois, who filed an Application for Registry—Wagering (Form 11-C) for the fiscal year ending June 30, 1957, which original return was examined by me on April 16, 1957.

During the interview Mr. Pomatot and Mr. Bugger stated that they picked up horse bets at Blaha's Tavern. Further, Mr. Bugger stated that their telephone bets were ordinarily received at Blaha's Tavern.

W. L. Buescher,
Internal Revenue Agent,
Internal Revenue Service,
as Aforesaid.

Subscribed and sworn to before me this 3rd day of May, 1957.

William G. Juergens,
U. S. District Judge.

Search Warrant

A-18

SEARCH WARRANT.

In the
United States District Court,
Eastern District of Illinois.

United States of America,

v.

The entire second floor consisting of one or more rooms, the number of rooms and their location being to deponent unknown, of the west one-half of a two story red brick building located on the Southeast corner of State Street and North 23rd Street in the City of East St. Louis, Illinois, such second floor being over a first floor in which a business is and has been operated under the name, style and description of "Zittel's Tavern".

Docket No.
Case No. 18768.

To any Special Agent of the Intelligence Division of the Internal Revenue Service of the United States of America:

Affidavit having been made before me by Glenwood Johnson, which affidavit by reference thereto incorporates therein affidavits made by Joseph M. Heckelbech, Norman J. Mueller, Donald B. Yerly, Allan J. Busch, W. L. Edwards, W. F. Ryan, and W. L. Buescher, that affiant knows that on the premises described as follows, to wit:

The entire second floor consisting of one or more rooms, the number of rooms and their location being to deponent unknown, of the west one-half of a two story red brick

Search Warrant

building located on the Southeast corner of State Street and North 23rd Street in the City of East St. Louis, Illinois, such second floor being over a first floor in which a business is and has been operated under the name, style and description of "Zittel's Tavern".

A-19 there is now being concealed certain property, namely divers records, to wit, books, memoranda, tickets, pads, ~~tablets~~ and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons who have won wagers or bets made at said place of business, and divers other tools, instruments, apparatus, United States currency and records, all of which are designed and intended for use, which have been and are being used in the conduct and carrying on of said wagering business on said premises, and designed and intended for use and which have been and are now being used as a means of committing divers criminal offenses against the laws of the United States, that is to say, the offense of wilfully attempting to evade and defeat a tax imposed by the Internal Revenue laws of the United States and the payment thereof, to wit, the special tax of \$50 a year to be paid by each person engaged in the business of accepting wagers, and each person engaged in receiving wagers for or on behalf of any person so liable, for the fiscal year ending June 30, 1957, under the provisions of Section 4411 of the Internal Revenue Code of 1954 in violation of Section 7201 of said Code (Section 7201, Title 26, U. S. C. A.), and the offense of wilfully failing to prepare and file with the District Director of Internal Revenue at Springfield, Illinois, the Special Tax Return and Application for Registry—Wagering

Return of Search Warrant

(Form 11-C) by any person engaged in the business of accepting wagers for the fiscal year ending June 30, 1957, under the provisions of Section 4412 of the Internal Revenue Code of 1954 in violation of Section 7203 of said Code (Section 7203, Title 26, U. S. C. A.), and being satisfied by reason of said affidavit which is attached hereto and made a part hereof by this reference thereto, that there is probable cause to believe that the property so described is being concealed on the premises above-described and that the foregoing grounds for application for issuance of the search warrant exist.

You, with proper assistance, within a reasonable time are hereby commanded to search the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there, to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant, and bring the property before me within ten days of this date, as required by law.

Dated this 5th day of May, 1957.

William G. Juergens,
United States District Judge.

RETURN.

A-20 I received the attached search warrant May 6, 1957, and have executed it as follows:

On May 6, 1957, between the hours 11:00 a. m. and 2:00 p. m., I, with assistance, searched the premises described in the warrant and

I left a copy of the warrant with Donald Kastner together with a receipt for the items seized.

Return of Search Warrant

The following is an inventory of the property taken pursuant to the warrant:

Item No.	Description.
----------	--------------

- | | |
|----|---|
| 1. | Tan note book entitled Weekly Time Book. |
| 2. | Miscellaneous records located on top of buffet. |
| 3. | Miscellaneous notes, pads, a check book, note book and turf programs found in left hand side of buffet. |

4. Nine racing forms in which are bound white and yellow memo notes and 11 yellow pads, one of which contains pencil notations.

5. 1 black loose leaf note book containing white lined pages and six yellow columnar sheets containing entries for May 2, 1957, May 3, 1957, and May 4, 1957, and several notes in envelope section of back cover.

6. 1 carton box bearing name Gordons Distilled Dry Gin containing 17 racing forms in which are bound various notes and memos.

7. Miscellaneous notes and records found in bottom drawer of sewing cabinet.

8. 1 metal box bearing name John Bauman Safe Co. on top containing

3	packages of 50	\$10.00 bills	\$1,500.00
3	packages of 20	5.00 bills	300.00
4	packages of 50	1.00 bills	200.00

\$2,000.00

and miscellaneous notes and deposit tickets.

9. 1 Dutch Masters Cigar box containing 14 rolls of 50 pennies, 1 silver dollar and 1 \$1.00 bill.

Return of Search Warrant

A-21 10. Seven rolls of fifty cent coins containing \$10.00 each. Four rolls of 40 twenty-five cent coins containing \$10.00 each. Five rolls of dimes containing \$5.00 each.

11. Miscellaneous racing form records and papers found in buffet.

12. Miscellaneous papers and records in upper left hand drawer of buffet.

13. One metal box containing numerous telephone bills and \$3.14 in pennies.

14. One metal box containing \$4.00 in 50 cent pieces; \$6.50 in quarters; \$2.30 in dimes and 50 cents in nickels.

15. Racing form and 2 scratch sheets.

The Inventory was made in the presence of Donald Kastner and Internal Revenue Agent Ira Minton.

I swear that this Inventory is a true account of all property taken by me pursuant to the warrant.

George W. Kienzler,
Special Agent,
Internal Revenue Service.

Subscribed and sworn to
and returned before me
this 10th day of May, 1957.

William G. Juergens,
United States
District Judge.

Indictment

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INDICTMENT.

The Grand Jury Charges:

COUNT I.

That Thomas Clancy, hereinafter called the defendant, on or about December 13, 1956, at East St. Louis, in the County of St. Clair, in the Eastern District of Illinois, did knowingly and wilfully violate Section 1001, Title 18, United States Code, in that said defendant did then and there, in a matter within the jurisdiction of the United States Treasury Department, Internal Revenue Service, knowingly and wilfully make a false, fictitious and fraudulent statement and representation of a material fact to Internal Revenue Agents Martin O. Mochel and W. L. Buescher, that is to say, that said defendant, while being interviewed by said Agents in connection with an examination of the wagering excise tax liability and the wagering occupational tax liability of Thomas D. Clancy, Donald Kastner and James A. Prindable, partners, doing business as the North Sales Company, then and there stated that he, the said defendant, Donald Kastner and James A. Prindable, partners, doing business as the North Sales Company, had no employees or agents accepting wagers on their behalf, other than Charles Kastner and Malcolm H. Wagstaff, which said statement was false, fictitious and fraudulent, as defendant then and there well knew.

COUNT II.

That Donald Kastner, hereinafter called the defendant, on or about May 6, 1957, at East St. Louis, in the County of St. Clair, in the Eastern District of Illinois, did knowingly and wilfully violate Section

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Indictment

1001, Title 18, United States Code, in that said defendant did then and there, in a matter within the jurisdiction of the United States Treasury Department, Internal Revenue Service, knowingly and wilfully make a false, fictitious and fraudulent statement and representation of a material fact to Special Agent George W. Kienzler, that is to say, that said defendant, while being interviewed by said Agent in connection with an investigation of the wagering excise tax liability and the wagering occupational tax liability of Thomas D. Clancy, Donald Kastner and James A. Prindable, partners, doing business as North Sales Company, and the wagering occupational tax liability of Otto Pohlman, Leo Klimas, Henry Zittel, John Kukurola, Lawrence Buklad, Harry Biermann, and numerous and divers other individuals, then and there stated that he did not know the names of individuals accepting wagers as agents of said Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company, which said statement was false, fictitious and fraudulent, as defendant then and there well knew.

COUNT III.

That James A. Prindable, hereinafter called the defendant, on or about December 14, 1956, at East St. Louis, in the County of St. Clair, in the Eastern District of Illinois, did knowingly and wilfully violate Section 1001, Title 18, United States Code, in that said defendant did then and there in a matter within the jurisdiction of the United States Treasury Department, Internal Revenue Service, knowingly and wilfully make a false, fictitious and fraudulent statement and representation of a material fact to Internal Revenue Agents Martin O. Mochel and W. L. Buescher, that is to say, that said defendant, while being interviewed by said Agents in connection with an examination of the wagering excise tax liability and wagering occu-

Indictment

3 pational tax liability of Thomas D. Clancy, James
A. Prindable and Donald Kastner, partners, doing
business as the North Sales Company, then and
there stated that he, the said defendant, did not know of
any other individuals accepting wagers in the operation of
a horse book except Thomas D. Clancy, James A. Prind-
able and Donald Kastner, partners, doing business as the
North Sales Company, which said statement was false,
fictitious and fraudulent, as defendant then and there well
knew.

COUNT IV.

That during the fiscal year ending June 30, 1957, Thomas
D. Clancy, James A. Prindable and Donald Kastner, herein-
after called the defendants, being residents of East St.
Louis, in the Eastern District of Illinois, were, within the
meaning of the Internal Revenue Code of 1954, engaged in
the business of accepting wagers as partners, doing busi-
ness as the North Sales Company, and became liable and
were required to pay the excise tax on wagers imposed by
the Internal Revenue Code of 1954, Chapter 35, Subchap-
ter A, equal to 10% of the amount of said wagers, and
that the defendants, and each of them, were required by
law and the applicable regulation to pay said wagering
tax on or before the last day of the month succeeding each
month in which the wagers were accepted by them, and
during said period to make wagering tax returns and to
pay such excise tax on wagers to the District Director of
Internal Revenue for the Internal Collection District at
Springfield, Illinois; that well knowing the foregoing facts,
the said defendants, during the fiscal year ending June 30,
1957, in the City of East St. Louis, County of St. Clair, in
the Eastern District of Illinois, did wilfully and knowingly
attempt to evade and defeat a large portion of the wager-
ing excise tax due and owing by said defendants to the

Indictment

United States of America during the fiscal year ending June 30, 1957; and in furtherance of said attempt to defeat and evade a large portion of the Federal excise tax on wagering due and owing by the said defendants to the United States of America for the fiscal year ending
4 June 30, 1957, said defendants did commit the following acts:

1. That on or about April 26, 1957, they did prepare and cause to be prepared at East St. Louis, in the Eastern District of Illinois, a Federal wagering excise tax return, Form 730, for Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company; which said return defendants filed and caused to be filed with the District Director of Internal Revenue, Springfield, Illinois, which said return reflected gross amount of wagers accepted during the month of March, 1957, of, to-wit: Eleven Thousand Nine Hundred Thirteen and 50/100 Dollars (\$11,913.50) and a net tax due in the amount of, to-wit: One Thousand One Hundred Ninety-one and 35/100 Dollars (\$1,191.35), which said return was false and fraudulent, as defendants then and there well knew, in that the gross amount of wagers accepted during the month of March, 1957, by Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company, was, to-wit: One Hundred Three Thousand Four Hundred Forty-one and 30/100 Dollars (\$103,441.30), upon which a net tax was due in the amount of, to-wit: Ten Thousand Three Hundred Forty-four and 13/100 Dollars (\$10,344.13).

2. That during the fiscal year ending June 30, 1957, the defendants, and each of them, did, at East St. Louis, in the Eastern District of Illinois, maintain and cause to be maintained, false and fraudulent books and records which did not accurately reflect the gross amount of wagers accepted

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by Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company, and they did cover up and conceal the identity of numerous agents and employees engaged in the business of accepting wagers in behalf of Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company.

3. That during the fiscal year ending June 30, 1957, the defendants, and each of them, did conceal and withhold from the District Director of Internal Revenue for the Springfield Collection District, and his agents, books
5 and records, sources of income and lists of agents accepting wagers on behalf of Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company.

4. That during the fiscal year ending June 30, 1957, defendants, and each of them, kept and maintained secret places of doing business in the City of East St. Louis, in the Eastern District of Illinois, for the purpose of concealing and covering up the scope and extent of the wagering business conducted by the defendants, Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company.

5. That on or about December 13, 1956, the defendant, Thomas D. Clancy, at East St. Louis, in the Eastern District of Illinois, did knowingly and wilfully make a false, fictitious and fraudulent statement and representation to Agents of the Internal Revenue Service, in that said defendant, Thomas D. Clancy, stated that he and defendants Donald Kastner and James A. Prindable had no employees or agents accepting wagers in their behalf other than Charles Kastner and Malcolm H. Wagstaff, which said statement was false, fictitious and fraudulent, as the defendant then and there well knew.

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6. That on or about May 6, 1957, at East St. Louis, in the Eastern District of Illinois, the defendant, Donald Kastner, did knowingly and wilfully make a false, fictitious and fraudulent statement and representation of a material fact to Agents of the Internal Revenue Service, that is to say, that the defendant, while being interviewed by said Agents, then and there stated that he did not know the names of individuals accepting wagers as agents of defendants, Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company, which said statement was false, fictitious and fraudulent.

6 7. That on or about December 14, 1956, at East St. Louis, in the Eastern District of Illinois, the defendant, James A. Prindable, did wilfully and knowingly make a false, fictitious and fraudulent statement to Agents of the Internal Revenue Service, wherein he stated that he, the said defendant, did not know of any other individuals accepting wagers in the operation of a horse book except Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company, which said statement was false, as he then and there well knew.

All in violation of Section 7201, Internal Revenue Code of 1954; Section 7201, Title 26, United States Code.

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COUNT V.

That beginning on or about July 1, A. D. 1953, the exact date being to the Grand Jurors unknown, and continuing thereafter and until the date of the return of this indictment in the Eastern District of Illinois and within the jurisdiction of this Court, Thomas D. Clancy, James A. Prindable, and Donald Kastner, defendants herein, unlawfully violated the provisions of Section 371, Title 18,

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United States Code, in that said defendants did conspire, confederate and agree together and with each other, and with divers other persons, whose true and full names are to the Grand Jurors unknown, to defraud the United States in the administration of the Internal Revenue laws, and to violate the provisions of Sections 7201, 7203, 7206, 7262, 4401, 4411, 4412, 4901, Internal Revenue Code of 1954, and Sections 2707 (c), 2707 (b), 3809 (a), 3294 (a), 3285 (a) (c) (d), 3290 and 3291, Internal Revenue Code of 1939, and Section 1001, Title 18, United States Code, that is to say, that said defendants on or about July 1, A. D. 1953, did enter into a partnership to carry on and engage in the business of accepting wagers under the name and style of the North Sales Company, and thereafter in the operation of said wagering business became liable and were required to pay the excise tax on wagers imposed by Section 4401 of the Internal Revenue Code of 1954, Chapter 35, Subchapter A, and Section 3285, Internal Revenue Code of 1939, equal to ten per cent (10%) of the amount of said wagers; that said defendants were required by law and the applicable regulations to pay said wagering tax on or before the last day of the month succeeding each month in which the wagers were accepted by them during said period, and said defendants were required by law to make wagering tax returns and to pay such excise tax on wagers to the Director of Internal Revenue for the Internal Revenue Collection District of Springfield, Illinois, and that said defendants were required by law and the applicable regulations, to pay the Wagering Occupational Tax imposed by Section 4411, Internal Revenue Code of 1954 and Section 3290, Internal Revenue Code of 1939, and to truly and correctly report to the Director of Internal Revenue for the Internal Revenue Collection District of Springfield, Illinois, the place and places at which said wagering business was carried on and the names and wagering occupational stamp number of each of the agents

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and employees engaged in accepting wagers for or on behalf of the defendants Thomas D. Clancy, James A. Prindable and Donald Kastner, doing business as the North Sales Company; that well knowing the foregoing facts, the said defendants and each of them did combine, conspire, confederate and agree together and with each other to defeat and evade a large part of the ten per cent (10%) wagering excise tax imposed by Section 4401, Internal Revenue Code of 1954 and Section 3285, Internal Revenue Code of 1939, and to conceal and cover up the names of agents and employees accepting wagers or bets on behalf of defendants, and for the purpose of defeating and evading the payment of the Wagering Occupational Tax imposed by Section 4411, Internal Revenue Code of 1954 and Section 3290, Internal Revenue Code of 1939, and in pursuance and furtherance of said conspiracy as aforesaid the Grand Jurors charge that defendants committed the following overt acts:

1. That the defendants maintained and caused to be maintained at East St. Louis, in the County of St. Clair, in the Eastern District of Illinois, false and fraudulent books, records and accounts, and concealed assets and covered up and concealed sources of income and the identity of individuals and employees accepting wagers for and on behalf of the defendants, Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company.

2. That on or about June 29, A. D. 1956, the defendants, Thomas D. Clancy, James A. Prindable and Donald Kastner, filed and caused to be filed a special tax return and application for registry—wagering, on Treasury Form 11C, wherein defendants stated that Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company, had

Motion to Dismiss Indictment

only two (2) agents, Malcolm H. Wagstaff and Charles Kastner, accepting wagers on their behalf, which said statement was false and fraudulent as defendants then and there well knew.

3. That on or about December 13, 1956, at East St. Louis, in the County of St. Clair, in the Eastern District of Illinois, the defendant Thomas D. Clancy, made a false, fictitious and fraudulent statement to Agents of the Internal Revenue Service, wherein he denied that Thomas D. Clancy, James A. Prindable and Donald Kastner, partners, doing business as the North Sales Company, had any employees or agents accepting wagers on their behalf other than Malcolm H. Wagstaff and Charles Kastner.

4. For further and additional overt acts the allegations of Counts One through Four, inclusive, are hereby incorporated in this Count of this indictment the same as if fully set forth herein.

C. M. Raemer,
United States Attorney.

12 **MOTION TO DISMISS INDICTMENT.**

Now comes the defendants, by their attorneys, O'Connell & Waller, and moves this Honorable Court to dismiss the indictment which has been rendered against them in the above entitled matter, and for their grounds for so moving state:

1. That Count I of the Indictment does not allege with reasonable certainty all material facts necessary to constitute an alleged crime against the United States.

2. That Count II of the Indictment does not allege with reasonable certainty all material facts necessary to constitute an alleged crime against the United States.

Motion to Dismiss Indictment.

3. That Count III of the Indictment does not allege with reasonable certainty all material facts necessary to constitute an alleged crime against the United States.

4. That Count IV of the Indictment does not allege with reasonable certainty all material facts necessary to constitute an alleged crime against the United States.

5. That Count V of the Indictment does not allege with reasonable certainty all material facts necessary to constitute an alleged crime against the United States.

6. That Count I of the Indictment is vague, ambiguous, and indefinite and does not sufficiently state the commission of a criminal act by the defendants against the United States.

7. That Count II of the Indictment is vague, ambiguous, and indefinite and does not sufficiently state the commission of a criminal act by the defendants against the United States.

8. That Count III of the Indictment is vague, ambiguous, and indefinite and does not sufficiently state the commission of a criminal act by the defendants against the United States.

13 9. That Count IV of the Indictment is vague, ambiguous, and indefinite and does not sufficiently state the commission of a criminal act by the defendants against the United States.

10. That Count V of the Indictment is vague, ambiguous, and indefinite and does not sufficiently state the commission of a criminal act by the defendants against the United States.

11. That Count I of the Indictment alleges conclusions as distinguished from statements of ultimate facts, and

Motion to Dismiss Indictment

therefore does not state facts with sufficient certainty to advise the defendants of the nature and cause of the accusation as required by the 6th Amendment to the Constitution of the United States to enable them to prepare their defense thereto, nor to characterize the purported offense as a violation of the statute therein alleged.

12. That Count II of the Indictment alleges conclusions as distinguished from statements of ultimate facts, and therefore does not state facts with sufficient certainty to advise the defendants of the nature and cause of the accusation as required by the 6th Amendment to the Constitution of the United States to enable them to prepare their defense thereto, nor to characterize the purported offense as a violation of the statute therein alleged.

13. That Count III of the Indictment alleges conclusions as distinguished from statements of ultimate facts, and therefore does not state facts with sufficient certainty to advise the defendants of the nature and cause of the accusation as required by the 6th Amendment to the Constitution of the United States to enable them to prepare their defense thereto, nor to characterize the purported offense as a violation of the statute therein alleged.

14. That Count IV of the Indictment alleges conclusions as distinguished from statements of ultimate facts, and therefore does not state facts with sufficient certainty to advise the defendants of the nature and cause of the accusation as required by the 6th Amendment to the Constitution of the United States to enable them to prepare their defense thereto, nor to characterize the purported offense as a violation of the statute therein alleged.

14 15. That Count V of the Indictment alleges conclusions as distinguished from statements of ultimate facts, and therefore does not state facts with sufficient cer-

Motion to Dismiss Indictment

tainty to advise the defendants of the nature and cause of the accusation as required by the 6th Amendment to the Constitution of the United States to enable them to prepare their defense thereto, nor to characterize the purported offense as a violation of the statute therein alleged.

16. That Chapter 35, Subchapter A, Internal Revenue Code of 1954, is unconstitutional in that it violates the 5th Amendment and the 10th Amendment to the Constitution of the United States.

17. That defendants, without waiving any of the objections heretofore found to said Indictment, charge that Count IV of the Indictment and Sub-paragraphs 2, 3, 5, 6 and 7 thereunder repeat the allegations contained in Counts I, II and III, and seek to charge two separate offenses arising out of the same set of facts.

18. That Count V of the Indictment fails to set forth any facts sufficient to constitute a violation of Title 18, Section 371, U. S. Code, in that said Count fails to set forth any of the Amendments sufficient to constitute a conspiracy; that none of the overt acts alleged could by intentment or innuendo constitute any efforts to further a conspiracy, confederation or agreement.

19. That the members of the Grand Jury which returned this Indictment against the defendants were not selected, drawn or summoned according to law.

20. That a sufficient number of legally qualified Grand Jurors did not concur in finding the Indictment against the Defendants.

21. That there was not sufficient legal or competent evidence produced before the Grand Jury which found the Indictment against the defendants upon which an indictment could be returned against the Defendants.

Motion for Return of Property and to Suppress Evidence

22. That the witnesses who testified against the defendants before the Grand Jury were compelled to testify under duress.

John F. O'Connell,
Paul P. Waller, Jr.,
Suite 214 Murphy Building,
East St. Louis, Illinois.
Attorneys for Defendants.

Attorneys for Defendants Request Oral Argument.

15 **MOTION FOR RETURN OF PROPERTY
AND TO SUPPRESS EVIDENCE.**

Now come the defendants by their attorneys, O'Connell & Waller, at the opening of the trial of this cause, after the jury has been sworn and again move this Honorable Court for the return of all property seized by the United States Internal Revenue Agents on May 6, 1957 from the premises commonly known as 2300a State Street, East St. Louis, Illinois, and to suppress the use of said items as evidence in the trial of this cause for the following reasons:

1. That the warrant issued was insufficient on its face.
2. That the property seized was not described in the warrant.

3. That there was no probable cause for believing the existence of the grounds on which the warrant was issued and the property seized.

4. That the warrant was illegally executed and issued in that none of the property which was listed in said warrant was designed or intended for use, or which was or had been used as the means or instrumentality for committing a criminal offense.

Affidavit in Support of Motion for Return of Property, etc.

5. That the search and seizure was unwarranted and illegal in that it violated the 4th Amendment to the Constitution, and the retention or use thereof of any property seized as alleged evidence infringes upon the privilege against incrimination as guaranteed by the 5th Amendment of the United States Constitution.

These defendants further readopt the briefs previously submitted by them in support of this motion.

AFFIDAVIT IN SUPPORT OF MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE.

Thomas D. Clancy, James F. Prindable and Donald Kastner, being first duly sworn, state:

1. That they had been engaged in the business of accepting wagers for several years prior to the fiscal year ending June 30, 1957, and that for each of the years in which they were so engaged in the business, they did prepare and file with the District Director of Internal Revenue at Springfield, Illinois, a special tax return and application for registry—wagering (Form 11-C, U. S. Treasury Department, Internal Revenue Service) and did pay the tax due thereon.

2. That accordingly, on approximately June 29, 1956, they did prepare and file said form for the fiscal year ending June 30, 1957, and did pay the tax due thereon and accordingly the District Director of Internal Revenue in Springfield, Illinois did issue a wagering stamp to them, being No. 10896 in the names of Thomas Clancy, James Prindable and Donald Kastner, under the name of North Sales Company and bearing registration No. 37-2369P.

3. That said Affiants have been engaged in the wagering business aforesaid under the name and style of North Sales Company.

Affidavit in Support of Motion for Return of Property, etc.

4. That on the Form 11-C aforesaid which was filed by the Affiants on approximately June 29, 1956, they did list as persons accepting wagers for them Charles Kastner and Malcolm Wagstaff.

5. That the Charles Kastner listed by them in their Form 11-C is the same person as the Charles J. Kastner and Charles J. Kastner, Jr., referred to in the Affidavit for search warrant for the premises commonly known and numbered as 2300a State Street, East St. Louis, Illinois.

6. That in their application for registry they listed their place of business "at large" and did in fact operate at various and numerous locations from time to time.

7. That said Affiants did prepare and file with the District Director of Internal Revenue at Springfield, Illinois a monthly report of the amount of wagers accepted by them and the amount of tax due thereon, which report was timely made and was submitted on Form 730 (U. S. Treasury Department, Internal Revenue Service) and further that said Affiants did pay the tax reported thereon.

8. That the Affiants did prepare and file a tax return for each of the months they were so engaged in accepting wagers, except the month of April, 1957, which return was not prepared because of the books and records of Affiants where were seized and which still are in the custody of the United States.

9. That immediately prior to December 13, 1956, U. S. Internal Revenue Agents, Martin O. Mochel and W. L. Buescher, examined the books of account of Affiants and on December 13 and December 14, 1956, Thomas Clancy and James Prindable and Donald Kastner respectively on said dates informed the Internal Revenue Agents aforesaid that they did operate their business at various and numerous locations, which fact was known to the District Direc-

Affidavit in Support of Motion for Return of Property, etc.

tor of Internal Revenue for several years last past, which information was indicated on the Form 11-C (U. S. Treasury, Internal Revenue Service), which Affiants filed for said years aforesaid.

10. That pursuant to the examination made by the Internal Revenue Agents, Martin O. Mochel and W. L. Buescher, the U. S. Director of Internal Revenue at Springfield, Illinois, H. J. White, did send to your Affiants a letter dated April 17, 1957, informing them that in regard to their wageing tax for the years January, 1955 through December, 1956:

“Our recent examination of your tax liability for the periods indicated above discloses that no change is necessary to the tax reported. Accordingly, the return(s) will be accepted as filed. Very truly yours,
H. J. White, District Director.”

11. That your Affiants have never given 2401 Ridge Avenue, East St. Louis, Illinois, as the business address of North Sales Company and did not in fact conduct any business there, said address being the home of Thomas D. Clancy.

12. That the property of the Affiants was seized on May 6, 1957 by the purported authority of a search warrant issued in Case No. 18768 in this Court, said property to be searched being described as “The entire second floor consisting of one or more rooms, the number of rooms and their location being to deponent unknown, of the west one-half of a two story red brick building located on the Southeast corner of State Street and North 23rd Street in the City of East St. Louis, Illinois, such second floor being over a first floor in which a business is and has been operated under the name, style and description of “Zittel's Tavern”.

13. That the property aforesaid of Affiants which was seized constitutes the books, records, private papers, docu-

Motion for Permission to Inspect the Transcript of, etc.

ments and money of the Affiants, all of which is listed on the return of the search warrant aforesaid.

14. That at the time the search warrant aforesaid was executed, and the raid was conducted on May 6, 1957, Donald Kastner was present on said premises and informed the Internal Revenue Agents that North Sales Company was conducting the business at the premises aforesaid and consequently, no arrest was made upon said premises.

Dated this 16th day of September, 1957.

Thomas D. Clancy,
James F. Prindable,
Donald Kastner.

Subscribed and sworn to before me this 16th day of September, 1957.

(Seal)

Wanda Jean Cowell,
Notary Public.

MOTION FOR PERMISSION TO INSPECT THE TRANSCRIPT OF EVIDENCE AND RECORD OF FOREMAN OF GRAND JURY.

16 Defendants move this Honorable Court for an Order permitting them to inspect the transcript of evidence of the Grand Jury of the May, 1956, term of the United States District Court for the Eastern District of Illinois, and also to inspect the record which is required to be kept by the Foreman or Deputy Foreman of the Grand Jury, under the provisions of Rule 6 (C) of the Federal Rules of Criminal Procedure, as they relate to these Defendants for the following reasons:

1. That defendants wish to challenge the array of the Grand Jury which was convened at the May, 1956, term of this Court on the ground that such Grand Jury was not selected, drawn or summoned in accordance with law and

Stipulation

that these defendants cannot obtain the information to determine whether or not the Grand Jury aforesaid was selected, drawn or summoned in accordance with law except by Order of this Court authorizing the records aforesaid to be made available to these defendants for their inspection.

2. That the defendants wish to challenge the legal qualifications of the individual Jurors of the Grand Jury who concurred in finding the aforesaid Indictment against the defendants, and that they cannot do so unless the record of the Grand Jury, which is required to be kept by the Foreman or Deputy Foreman, is made available to the Defendants by Order of this Court.

3. That the Defendants do not believe that sufficient, legal and competent evidence was adduced before the Grand Jury aforesaid which could have been the basis for the matters and things alleged in said Indictment against them.

STIPULATION.

19. It is hereby stipulated and agreed by and between John F. O'Connell and Paul P. Waller, Jr., as attorneys for the Defendants, and Clifford M. Raemer, United States Attorney, and James B. Moses, Assistant United States Attorney, Eastern District of Illinois, in behalf of the United States of America:

1. That some of the information taken from the books and records seized and listed in the return of the search warrant was presented to the Grand Jury which was then and there sitting in the Eastern District of Illinois; that the said Grand Jury subsequently returned indictments against these defendants; that all of the books and records seized are the partnership properties of the above defendants (except to the extent that they may come within the

Stipulation

operation of Section 7302, Internal Revenue Code of 1954), and were listed as Items 1 through 15, inclusive, in the return of the search warrant for the second floor premises of the property known as 2300 and 2300A State Street, East St. Louis, Illinois, with the exception of those items covered in Item 2.

2. That Defendants' Exhibits A, B, and C, which are attached to brief of defendants, can be received in evidence without objection, and be considered by this Court as being offered as evidence in support of the Motions heretofore filed, and that said exhibits are in fact true and correct copies of the original documents.

20 3. That the photostatic copies of affidavit for search warrant and the search warrant in Criminal No. 18768, said affidavit for search warrant and search warrant covering the first floor of the premises known as 2300 and 2300A State Street, East St. Louis, Illinois, may be admitted into evidence in this cause, except for the objection of the Government of materiality and relevancy.

4. That the United States will produce photostatic copies of the Internal Revenue Tax Return and Application for Registry-Wagering Forms 11-C, which were filed by the defendants for the years 1954-1955 and 1955-1956.

5. It is further stipulated and agreed that this is the stipulation mentioned at page 6 of the defendants' brief in support of their motion heretofore filed with the Court.

Dated this 27th day of March, 1958.

John F. O'Connell,
Paul P. Waller, Jr.,

Attorneys for Defendants.

Clifford M. Raemer,
United States Attorney,
James B. Moses,
Assistant U. S. Attorney.

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ORDER.

21 The court having read the defendants' (1) Motion to Dismiss Indictment; (2) Motion for Return of Property and to Suppress Evidence; (3) Motion for Permission to Inspect Transcript of Evidence and Record of Foreman of Grand Jury, having read the briefs in support thereof and in opposition thereto, and having heard, in open court, oral arguments in support of the motions and in opposition thereto, and being fully advised in the premises, finds that the defendants' (1) Motion to Dismiss Indictment; (2) Motion for Return of Property and to Suppress Evidence; and (3) Motion to Inspect the Transcript of Evidence and Record of Foreman of Grand Jury should be denied.

It Is, Therefore, the Order of this court that the defendants' (1) Motion to Dismiss Indictment; (2) Motion for Return of Property and to Suppress Evidence; and (3) Motion to Inspect the Transcript of Evidence
22 and Record of Foreman of Grand Jury should be and the same are hereby denied.

(signed) William G. Juergens,
United States District Judge.

Dated: July 25, 1958.

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Juergens, Judge.

23 The defendants, Thomas D. Clancy, James A. Prindable, and Donald Kastner, are charged in a five count indictment with violations of various sections of Title 18 and Title 26, United States Code.

Counts I, II and III charge the defendants with having knowingly and wilfully violated Section 1001, Title 18,

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United States Code, in that the defendants did in a matter within the jurisdiction of the United States Treasury Department, Internal Revenue Service, knowingly and wilfully make false, fictitious, and fraudulent statements and representation of material facts to the Internal Revenue agents. The indictment sets out the text of the statements and the dates upon which said statements were made. Count IV of the indictment charges the defendants with the violation of Section 7201 of the Internal Revenue Code of 1954 (Section 7201, Title 26, United States Code), in that the defendants did wilfully attempt to evade
24 or defeat the tax imposed upon them by the Internal Revenue Code, and further sets out the acts which are alleged to be violations of the above section.

Count V of the indictment charges the defendants with having conspired among themselves and with other persons to defraud the United States in the administration of the Internal Revenue Laws and to violate the provisions of Sections 7201, 7203, 7206, 7262, 4401, 4411, 4412, 4901, Internal Revenue Code of 1954, and Sections 2707 (c), 2707 (b), 3809 (a), 3294 (a), 3285 (a) (c) (d), 3290, and 3291, Internal Revenue Code of 1939, and Section 101, Title 18, United States Code. The indictment further sets out the acts of these parties which constitute the violations of the above enumerated sections.

The defendants have filed their motion to dismiss the indictment, their motion for return of property and to suppress evidence, and their motion for permission to inspect the transcript of evidence and record of the foreman of the grand jury.

The motion to dismiss the indictment will be first considered.

The defendants allege as grounds for the dismissal of the indictment that each count thereof fails to allege with

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reasonable certainty all material facts necessary to constitute an alleged crime against the United States; that each count is so vague, ambiguous, and indefinite that it does not sufficiently state the commission of a criminal act by the defendants against the United States, that each count of the indictment alleges conclusions as distinguished from statements of ultimate facts, and therefore

does not state facts with sufficient certainty to advise the defendants of the nature and cause of the accusations, as required by the 6th Amendment of the Constitution of the United States, to enable them to prepare their defense thereto, nor to characterize the purported offense as a violation of the statute therein alleged.

Under Rule 7 (c) of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., it is provided:

“ . . . The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . ”

This rule is designed to simplify indictments by eliminating unnecessary phraseology which burdened many indictments under the former practice. Nevertheless it does not and it was not intended that this rule should alter or modify the formal functions and requirements of indictments. Every essential element of the offense sought to be charged in the indictment must still be alleged. *Wilson v. United States*, 158 F. 2d 65. It is not necessary for the indictment to allege mere matters of evidence but sufficient facts must be alleged to apprise the accused of the crime charged against him with sufficient certainty as will enable him to make his defense and avail himself of a conviction or acquittal for protection against a subsequent prosecution for the same offense. Every essential ingredient of the offense must be alleged with precision and certainty. *Spies v. United States*, 317 U. S. 492; *Clay v. United States*, 218 F. 2d 483.

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26 An examination of the indictment compared with the sections of the statute alleged therein to have been violated, discloses that the charges made in the indictment substantially follow the statute which embodies all of the elements of the crime. In addition to the above requirements the indictment further sets out the dates during which the alleged acts, constituting the offense, were committed and the acts which constituted the offense. Each count of the indictment states facts sufficient to give notice to the defendants of the crime against which they are to defend. The facts, if proved, are sufficient to give this court jurisdiction over the crime. Sufficient facts are alleged to enable the defendants to plead a judgment of this cause as a defense to a future prosecution for the same offense. The court is, therefore, of the opinion that the motion to dismiss, which relates to insufficiency of the indictment as specifically set out above is without merit and must be denied.

The defendants next charge that Chapter 35, Subchapter a, of the Internal Revenue Code of 1954, is unconstitutional in that it violates the 5th Amendment and the 10th Amendment to the Constitution of the United States. The Supreme Court of the United States has held that the statute above referred to is constitutional and not in any respect in violation of the Constitution of the United States of America. *Lewis v. United States*, 348 U. S. 419, and *United States v. Kahriger*, 345 U. S. 22.

27 The defendants next charge that Count IV of the indictment and sub-sections 2, 3, 5, 6 and 7 thereunder repeat the allegations contained in Counts I, II and III of the indictment and seek to charge two separate offenses arising out of the same set of facts. An examination of the indictment discloses that a separate and distinct violation of the laws of the United States

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is charged in Count IV from that which is charged in Counts I, II and III. The defendants' charge as to the sufficiency of the grounds on this basis is without merit.

The defendants then challenge the validity of the acts of the grand jury which returned this indictment. It is charged that the grand jury members were not selected, drawn or summoned according to law; that a sufficient number of legally qualified grand jurors did not concur in finding the indictment against these defendants; that there was not sufficient legal or competent evidence before the grand jury which found the indictment against these defendants, upon which the indictment could be returned against these defendants; and that the witnesses who testified against the defendants before the grand jury were compelled to testify under duress.

Each of the charges made by the defendants concerning the grand jury, the method by which it was selected, drawn or summoned, and the actions of the grand jury set out above are nothing more than naked allegations. Nowhere does it appear that there is any validity in the charges made concerning the grand jury. The court declines to enter into an investigation of the grand jury to ascertain whether or not the grand jury exercised good judgment in returning a true bill. As was stated in *Cox v. Vaught*, 52 F. 2d 562 (10th Cir. 1931):

28. "The grand jury is charged to investigate the facts presented to it and return indictments only if there is legal and competent evidence that an offense has been committed and reasonable ground to believe that those charged are guilty. There is a strong presumption that the grand jury has faithfully discharged its duty. While the presumption is strong, it is not irrebuttable, and if it is clearly proven that an indictment

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was returned without evidence, the indictment must be quashed."

In the instant case not only was there not strong evidence, there was no evidence presented by way of an affidavit or otherwise that the actions of the grand jury were not consistent with their duties as a grand jury. The court finds that the charges made by these defendants against the grand jury are not in any way substantiated by any fact and that the allegations are utterly void of merit.

The motion of the defendants to dismiss the indictment should be denied.

The defendants' motion for return of property and to suppress evidence will be next considered.

In this motion the defendants ask for the return of property and that certain evidence be suppressed for the following reasons:

1. That the warrant issued was insufficient on its face.
2. That the property seized was not described in the warrant.
3. That there was no probable cause for believing the existence of the grounds on which the warrant was issued and the property seized.
4. That the warrant was illegally executed and issued in that none of the property which was listed in said warrant was designed or intended for use, or which was or had been used as a means or instrumentality for committing a criminal offense.
5. That the search and seizure was unwarranted and illegal in that it violated the 4th Amendment to the Con-

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stitution and the retention or use thereof of any property seized as alleged evidence infringes upon the privileges against incrimination as guaranteed by the 5th Amendment to the United States Constitution.

An examination of the warrant discloses that it conforms to the requirements of a search warrant. Application for it was made to this court, and upon review of the application and the matters contained therein, this court found that probable cause existed for the issuance of the warrant. The affidavit for search warrant particularly described the premises known as "The entire second floor consisting of one or more rooms, the number of rooms and their location being to deponent unknown, of the west one-half of a two-story red brick building located on the Southeast corner of State Street, and North 23rd Street in the City of East St. Louis, Illinois, such second floor being over a first floor in which a business is and has been operated under the name, style and description of 'Zittel's Tavern' ". That the premises above described have been and are being used in the conduct and carrying on of a "Wagering Business", that there is now concealed therein certain property, namely, diverse records, 20 to-wit, books, memoranda, tickets, pads, tablets, and papers recording the receipt of money from and the money paid out in connection with the operation of said wagering business on the premises, and designed and intended for use, which have been and are now being used as a means of committing divers criminal offenses, against the laws of the United States; that is to say, the offense of wilfully attempting to evade and defeat a tax imposed by the Internal Revenue laws of the United States and the payment thereof, to-wit, the special tax of \$50 a year to be paid by each person engaged in the business of accepting wagers, and each person en-

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gaged in receiving wagers for or on behalf of any person so liable, for the fiscal year ending June 30, 1957, under the provisions of Section 4411 of the Internal Revenue Code of 1954 in violation of Section 7201 of the Internal Revenue Code of 1954 (Section 7201, Title 26, U. S. C. A.); and the offense of wilfully failing to prepare and file with the District Director of Internal Revenue at Springfield, Illinois, the Special Tax Return and Application for Registry—Wagering (Form 11-C) for the fiscal year ending June 30, 1957, in the name of the operator of said business, namely, one John Doe, under the provisions of Section 4412 of the Internal Revenue Code of 1954 in violation of Section 7203 of said Code (Section 7203, Title 26, U. S. C. A.), and that there has been and is now being concealed in said premises certain other property used,

designed and intended for use aforesaid, to-wit, files,
31 desks, tables and receptacles, the exact description of which is unknown, for storing of books, memoranda, tickets, pads, tablets and papers aforesaid, telephones for the receipt of wagers and the receipt of information concerning horse races and other sporting contests, and divers receptacles in the nature of envelopes in which there is kept money won by patrons who have won wagers or bets made at said place of business, and divers other tools, implements, apparatus and records designed and used for the purposes aforesaid. It is further shown that a special agent of the Intelligence Division of the Internal Revenue Service of the United States, which acting in such capacity, placed wagers on horse races on two occasions during the months of March and April, 1957, with a man known to him as "Heine" at said "Zittel's Tavern" and the manner in which these wagers were placed is described in detail. It is also shown that on March 20, 1957, a woman was observed giving said "Heine" money, envelopes, racing form, and scratch sheets, a part of which

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was later given to Agent Glenwood Johnson as winnings for wagers previously placed with "Heine". The affidavit further discloses that there was reason to believe that a wagering business was being conducted on said premises; the facts upon which such belief is premised are shown by affidavits of other agents, which are incorporated in and made part of the affidavit for search warrant. These latter affidavits show that the files of the Internal Revenue Department disclose that no wagering stamp was issued for use on the described premises.

The warrant is clearly sufficient on its face.

32 The defendants' allegation that the property seized was not described in the warrant is without merit since it clearly appears that the property seized by the agents upon the execution of the search warrant were items listed in the warrant when it was issued out of this court.

The allegation that there was no probable cause for believing the existence of the grounds on which the warrant was issued and the property seized is likewise without merit. In order for a warrant to issue, probable cause that there is a violation of law occurring on the premises is necessary. What constitutes probable cause has been well defined by the courts. In *United States v. Schwartz*, 151 F. Supp. 399, it is stated:

"Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Brinegar v. United States*, 338 U. S. 160 (1948)."

An examination of the affidavit for search warrant readily discloses that the facts known to the agents were clearly

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sufficient to indicate that a crime was being committed on the premises.

The defendants' declaration that the warrant was illegally executed and issued on the basis that the property listed in the warrant was not the means or instrumentality for committing a criminal offense is likewise found to be without merit. The defendants declare that the materials obtained through the search and seizure were the private books and records of the defendants and as such are merely evidence, and that they were not used as a means or instruments used in the commission of the crime.

It is true that a search warrant may not be issued solely for the purpose of making a search to secure evidence to be used against the accused in a criminal proceeding. *Gould v. United States*, 225 U. S. 298. However, where the materials are instrumentalities and means by which a crime is committed, they are fruits of the crime and are clearly articles subject to seizure. *Harris v. United States*, 331 U. S. 145.

The items seized under this search warrant were the time books, records, notes, money, racing form, telephone bills, scratch sheets and other items. The court finds that the items seized under the authority of the search warrant were used and intended to be used as a means of carrying on the attempt to defeat and evade the excise tax and thus must be considered as instrumentalities in conducting the illegal operations. They are not merely the private books and records of the defendants. The court holds that the items were properly seized under the authority of the search warrant.

The defendants' contention that the search and seizure was unwarranted and illegal in that it violated the 4th

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Amendment to the Constitution and the retention or use thereof of any property seized as alleged evidence infringes upon the principles of incrimination as guaranteed by the 5th Amendment to the United States Constitution is likewise unfounded. As pointed out above 34 the search and seizure was made pursuant to a valid search warrant. It has been shown above that probable cause existed for the issuance of the search warrant, and where probable cause exists, it is proper for a search warrant to be issued and served pursuant to the warrant. *United States v. Doe*, 19 F. R. D. 1. The search was directed to property designed or intended for use and which had been and was being used as a means of committing a criminal offense. It is the use of this property as evidence that the defendants allege infringes on the constitutional right against self-incrimination. In this contention the defendants are in error inasmuch as the items seized were not the private books or papers of these defendants, but rather was property used in the commission of crime and, therefore, not protected under the 5th Amendment as the defendants here assert.

The motion for return of property and to suppress evidence must be denied.

The next motion to be considered is that presented by the defendants in which they seek permission to inspect the transcript of evidence and record of the foreman of the grand jury. The defendants state that this motion is made for the reason that they wish to challenge the array of the grand jury in that the grand jury was not properly selected, drawn and summoned in accordance with the law; that they wish to challenge the legal qualifications of the individual jurors of the grand jury; and that the indictment was returned on insufficient and incompetent evidence.

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35 This motion is based on nothing more than the bare, naked, unfounded assertions of the defendants. Nowhere does it appear that there is any basis for these assertions made against the validity of the action taken by the grand jury in this cause.

The grand jury is charged to investigate the facts presented to it and to return indictment only if there is legal and competent evidence that an offense has been committed and reasonable ground to believe that those charged are guilty. There is a strong presumption that the grand jury has faithfully discharged its duty. *Cox v. Vaught*, 52 F. 2d 562 (10th Cir. 1931). The testimony before a grand jury is not a matter to be displayed before the public generally and should not be disclosed except upon good cause shown and such cause should be reasonably founded upon facts. Only in such circumstances should the secrecy of the proceedings before the grand jury be violated. The only evidence to support the motion of the defendant is based upon the bare allegation of the defendant on information and belief. If this were sufficient to allow a review of the proceedings before the grand jury, the courts would be obliged to try and weigh the evidence in each and every proceeding presented to the grand jury. Then if it were found that there was no competent evidence to sustain the charge against the grand jury, the accused would have the prosecution's case in advance to con-

36 trive against at his leisure. Such action would necessarily complicate every trial and our criminal procedure would become more unwieldy, dilatory and uncertain. *Kastel v. United States*, 23 F. 2d 156. The defendants' request is not proper and the disclosure of any documentary evidence presented to the grand jury would be an invasion of the secrecy of the grand jury proceedings, which may not be violated either directly through the inspection of the grand jury matters or indirectly by

Amended Motion to Dismiss

disclosure of documentary evidence presented to the grand jury. United States v. Stein, 18 F. R. D. 17.

The defendants' motion for permission to inspect the transcript of evidence and record kept by the foreman of the grand jury must be denied.

(s) William G. Juergens,
United States District Judge.

Dated: July 25, 1958.

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AMENDED MOTION TO DISMISS.

Now come the defendants, Thomas D. Clancy, James A. Prindable and Donald Kastner, by their attorneys, John F. O'Connell and Paul P. Waller, Jr., and move this Honorable Court to dismiss the indictment which was returned against these defendants, and for their reason for so moving at this time state: that they are filing this Amended Motion to Dismiss at this time because of newly discovered evidence which is contained in an affidavit executed by Bolen Carter, Jury Commissioner of this Court, on May 7, 1959 and filed in this Court on May 8, 1959 as an exhibit to defendant's Motion to Dismiss Indictment in the case styled United States of America v. Sam George Magin, Criminal No. 18673. A copy of said affidavit is attached hereto marked "Exhibit A" and incorporated herein by reference.

For their grounds for so moving defendants state:

1. That the indictment was not returned by a legally constituted grand jury.

2. That the Grand Jury which returned the indictment was an illegal body.

(A) The names of the persons serving as jurors, who returned the indictment, were not publicly drawn

Amended Motion to Dismiss

from a jury box into which the Jury Commissioner and the Clerk or his deputy, had previously and alternately placed one name in the jury box without reference to party affiliation until the box contained at least Three Hundred (300) names, or such larger number of names as determined by the Court, as required by law.

53 (B) The names of the persons serving as jurors, who returned the indictment, were not publicly drawn from a box as to which, the Jury Commission determined that at the time of the drawing of the Grand Jury there were at least Three Hundred (300) names in the box of qualified jurors, as required by law.

(C) The names of the persons serving as jurors, who returned the indictment, were not publicly drawn from a box containing the names of not less than Three Hundred (300) qualified persons at the time of such drawing, as required by law.

(D) The names of the persons serving as jurors, who returned the indictment, were not publicly drawn from a box of qualified jurors so as to insure the selection of Grand Jurors without the exercise of discretion.

(E) The names of the persons serving as jurors were arbitrarily and capriciously selected by the Clerk and Jury Commissioner.

(F) The names of the persons serving as jurors were selected by the Clerk and Jury Commission from a small undefined territorial portion of the Eastern District of Illinois, without any legal authority to make such selection.

(G) The names of the persons contained in the jury box were not qualified jurors chosen by the Jury

Amended Motion to Dismiss

Commission consisting of the Clerk and the Jury Commissioner, but were all chosen by the Clerk only.

3. That the Jury Commission failed to follow the prescribed statutory requirements in the selection of persons from which the Grand Jury would be chosen.

4. That such defects in the institution of the prosecution resulted directly from the acts of the Jury Commission, the particulars of which are set out in the affidavit attached hereto and made a part hereof.

54 5. That these defendants were never indicted by a competent tribunal, to-wit: a properly selected, drawn and summoned Grand Jury in and for the Eastern District of Illinois, and further that this Court does not now presently have a competent panel of veniremen selected to serve as petit jurors in the trial of this cause which is set for trial on May 11, 1959, inasmuch as said grand jurors and petit jurors were selected illegally in the manner stated in said attached affidavit.

6. That these defendants are entitled to make proof of such facts, if the same are denied by the Government, and are entitled to a determination by this Court of the issues presented by this Motion prior to the commencement of their trial on May 11, 1959.

7 to 28. That these defendants reaffirm and reallege, and incorporate herein by reference as Paragraphs 7 through 28 inclusive, Paragraphs 1 through 22 inclusive of their Motion to Dismiss previously filed in this cause on August 14, 1957.

29 to 31. That these defendants reaffirm and reallege, and incorporate herein by reference as Paragraphs 29 through 31 inclusive, Paragraphs 1 through 3 inclusive of their Motion to Dismiss previously filed in this cause on April 24, 1959.

Affidavit of Bolen J. Carter

Wherefore, these defendants pray:

1. That the Court direct the Government to respond to this Motion prior to the commencement of the trial of this cause, either admitting or denying the statements contained in the attached affidavit.

2. That if such statements contained in the attached affidavit are not denied by the Government that the Court enter an Order dismissing the indictment in this cause.

3. That if such statements contained in said attached affidavit, or any part of them are denied, that this Court set this Motion for hearing prior to the commencement of the trial in this cause, and after having made findings of fact and conclusions of law, that the Court enter an Order dismissing the said indictment.

4. That the trial of this cause be not commenced until there has been a final determination by this Court concerning the legality of the grand jurors who indicted these defendants, and the veniremen summoned to serve as petit jurors in the trial of this cause.

EXHIBIT A.

State of Illinois, }
County of St. Clair. } ss.

Affidavit of Bolen J. Carter.

56 Bolen J. Carter, being first duly sworn on oath, deposes and states: That affiant resides at 2909 Audubon Street, in the City of East St. Louis, the County of St. Clair, in the Eastern District of the State of Illinois.

That affiant was upon September 23, 1947 appointed Jury Commissioner of the United States District Court in the Eastern District of Illinois and qualified as such Commis-

Affidavit of Bolen J. Carter.

sioner and has acted as such Commissioner from that date to the date hereof.

That upon assuming the Office of Jury Commissioner, as aforesaid, affiant learned that there was being maintained in the Office of the Clerk of the United States District Court for the Eastern District of Illinois, at East St. Louis, Illinois, a certain box, approximately 12 inches wide by 15 inches long by 12 inches deep, and that in such box had been placed the names and addresses of various persons who were supposedly qualified jurors residing in the Eastern District of the State of Illinois; that upon assuming the aforesaid office affiant saw in said box the cards containing names and addresses of persons therein; that affiant at no time examined said cards, nor any informative data concerning the persons whose names appeared on said cards which were then in said box; that affiant has never seen any of said names removed from said box from that time to the time hereof except as such cards may have been withdrawn from time to time in connection with the drawing of names for grand juries or petit juries; that affiant has never been informed by the Clerk of said
57 United States District Court for the Eastern District of Illinois or any of his deputies that any of such names have been withdrawn from said box.

Affiant further states that from time to time during the past 12 years names have been added to the names in said box; that he has been informed by the Clerk of the Court that such Clerk has secured the names and addresses of additional persons residing in the Eastern District of Illinois, whom said clerk believed to be qualified jurors; and whose names and addresses have been placed in said box; that affiant has from time to time during the said past 12 years written letters to groups and organizations or representatives thereof, and at one time to approximately 43 superintendents of schools throughout the Eastern District

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Affidavit of Bolen J. Carter

of Illinois requesting that such persons transmit to affiant the names and addresses of persons deemed qualified to act as jurors; that in response to said letters affiant did receive from time to time certain names and addresses which affiant would estimate aggregated approximately 200, which said names and addresses affiant turned over to Douglas Reed, Clerk of the United States District Court for the Eastern District of Illinois; that affiant was on subsequent occasions informed by Mr. Reed that he had sent questionnaires to such persons as well as other persons, and that on the basis of returned questionnaires the clerk had prepared cards containing names and addresses of such of those persons whom said clerk had determined were qualified to act as jurors and which were then placed in said jury box; that affiant has at no time been presented with or examined any of said questionnaires, nor does he know of his own knowledge that the persons whose names and addresses were placed on such cards and subsequently placed in said jury box were in fact qualified jurors; that affiant at all times accepted the statements of said clerk that such persons were qualified.

58 That from time to time when affiant would meet with the clerk in the office of said clerk, the clerk would hand to the affiant some of the cards on which the names of supposedly qualified jurors were placed and affiant and the clerk would alternately drop said cards into said jury box; that said jury box contained to the best of the knowledge of this affiant all of the cards containing the names and addresses of prospective jurors; that to the best knowledge of this affiant no record has been maintained of the number of prospective jurors residing in each of the several counties, comprising the Eastern District of Illinois; that the affiant and said clerk have at no time ever checked through said list of names to determine the number of persons whose names appeared upon said cards

Affidavit of Balen J. Carter

residing in the various counties of said district; that it is possible that there are no names of persons residing in certain of the counties of said district, and that some counties may have a far larger proportion of names of residents of such counties in said box than the population of such counties bears to the population of said district.

That the procedure for drawing names of jurors for either a panel of grand or petit juries is and has been for 10 years last past, as follows:

The box containing the cards upon which the names and addresses of the various jurors were placed would be brought to the outer office of the Clerk of the United States District Court for the Eastern District of Illinois at East St. Louis, Illinois; that the box would be placed upon a table; that the clerk and this affiant would sit on opposite sides of the table upon which the box was located and the clerk and this affiant would then take a handful of cards and each would then place a card face up on the table. If the card contained the name of a person, who in the opinion of the drawer, resided within a reasonable distance of the place at which the grand jury or petit jury was to function; namely, East St. Louis, Illinois, Danville,

Illinois, Cairo, Illinois, Benton, Illinois, the card
59 would be placed to one side; if in the opinion of the person looking at such card the prospective juror lived at a greater distance from such place than the person looking at such card determined reasonable, then the card would be placed to the other side; the several cards of prospective jurors would be so sorted until the number desired to be drawn for the panel would be reached among the group of those persons whom either the clerk or this affiant deemed to live within a reasonable distance from the place where said jury was to function, and the cards containing the names and addresses of prospective jurors

Affidavit of Bolen J. Carter

which had been excluded would then be gathered together and placed back in the box and the cards containing the names and addresses of those prospective jurors which the clerk or this affiant deemed to live within a reasonable distance would be retained. This affiant did not check the cards examined by the clerk either as to the jurors included or excluded, nor did the clerk examine the cards included or excluded by this affiant. After the drawing aforesaid the clerk would then take the cards containing the names of the jurors to be included in the panel and this affiant assumed used such names only as prospective jurors. Affiant did not at such time or at any time make a list of such names with said clerk, nor does affiant know whether the cards containing such names were or were not subsequently returned to the box containing the names of prospective jurors.

Affiant has never been served with, nor has he ever received a directive or order issued by a judge of the United States District Court for the Eastern District of Illinois directing the choice of jurors such as conducted by
60 him and said clerk and specifying the counties which were to be included as a part of the area from which jurors would be drawn or from which they should be excluded. This affiant simply exercised his judgment as to what he judged was a reasonable distance within which to pick persons; namely, approximately 50 to 60 miles from the place at which said jury was going to function, the clerk likewise exercised his discretion as to area and distance from which he would include or exclude prospective jurors. Occasionally each would suggest to the other that the prospective juror was or was not as the case might be within or without the so-called reasonable distance.

Affiant further states that he has never separately or in conjunction with the clerk counted the list of cards of

Order of Court

prospective jurors in the box. Affiant best estimates that there are approximately 200 cards in the box but it is possible that there may be 400 to 500 in it.

Affiant further states that at no time in drawing the names of prospective jurors did the clerk or his deputy and this affiant draw separate cards alternatively from said box containing the names of prospective jurors and place them in another receptacle until a minimum of 300 names had been so drawn and placed in said receptacle and from such receptacle thereafter the cards containing the names of the required number of jurors drawn by chance.

Bolen J. Carter.

Subscribed and sworn to before me this 7th day of May, 1959.

My commission expires:

(Seal)

Joseph H. Goldenhersh,
Notary Public.

ORDER OF COURT.

67. The Court, having read the defendants' amended motion to dismiss, having heard oral arguments thereon and being fully advised in the premises, finds that the defendants' amended motion to dismiss should be denied.

It Is, Therefore, the Order of this Court that the defendants' amended motion to dismiss be and the same is hereby denied.

(s) William G. Juergens,
United States District Judge.

Dated: May 12, 1959.

Opinion of Court

OPINION OF COURT.

68 The cause is before the Court at this time for the purpose of deciding defendants' amended motion to dismiss the indictment.

In support of their motion these defendants allege that the grand jury was improperly impaneled and

1. That the indictment was not returned by a legally constituted grand jury;

2. That the grand jury which returned the indictment was an illegal body:

(A) The names of the persons serving as jurors, who returned the indictment, were not publicly drawn from a jury box into which the Jury Commissioner and the Clerk or his deputy, had previously and alternately placed one name in the jury box without reference to party affiliation until the box contained at least three hundred (300) names, or such larger number of names as determined by the Court, as required by law.

69 (B) The names of the persons serving as jurors, who returned the indictment, were not publicly drawn from a box, as to which, the Jury Commission determined that at the time of the drawing of the grand jury there were at least three hundred (300) names in the box of qualified jurors, as required by law.

(C) The names of the persons serving as jurors, who returned the indictment, were not publicly drawn from a box containing the names of not less than three hundred (300) qualified persons at the time of such drawing, as required by law.

Opinion of Court

(D) The names of the persons serving as jurors, who returned the indictment, were not publicly drawn from a box of qualified jurors so as to insure the selection of grand jurors without the exercise of discretion.

(E) The names of the persons serving as jurors were arbitrarily and capriciously selected by the Clerk and Jury Commissioner.

(F) The names of the persons serving as jurors were selected by the Clerk and Jury Commission from a small undefined territorial portion of the Eastern District of Illinois, without any legal authority to make such selection.

70 (G) The names of the persons contained in the jury box were not qualified jurors chosen by the Jury Commission consisting of the Clerk and the Jury Commissioner, but were all chosen by the Clerk only.

3. That the Jury Commission failed to follow the prescribed statutory requirements in the selection of persons from which the grand jury would be chosen.

4. That such defects in the institution of the prosecution resulted directly from the acts of the Jury Commission, the particulars of which are set out in the affidavit attached hereto and made a part hereof.

5. That these defendants were never indicted by a competent tribunal, to wit: a properly selected, drawn and summoned grand jury in and for the Eastern District of Illinois, and further that this Court does not now presently have a competent panel of veniremen selected to serve as petit jurors in the trial of this cause which is set for trial on May 11, 1959, inasmuch as said grand jurors and petit jurors were selected illegally in the manner stated in said attached affidavit.

Opinion of Court

As evidence in support of their motion the defendants presented an affidavit of the Jury Commissioner. The Court has examined in detail the affidavit as presented. This affidavit establishes that contrary to the assertion of the defendants the names of the jurors were properly drawn, that there were, in the words of the Jury Commissioner, at least 200 names in the jury box and possibly as many as 500. There was no showing that there was not contained in the jury box a minimum of the number
71 of names required by the statute; there was no showing whatever that the parties serving as jurors were in any way distinguished as to party affiliation; no mention whatever as to party affiliation of the persons drawn was made. There was no showing that there was any exercise of discretion on the part of the Clerk and Jury Commissioner, aside from the fact that jurors were selected who lived within a reasonable distance of the place, at which the court was being held, in preference to the names of persons who resided at a greater distance from the seat of the court in order to avoid unnecessary expenses in the impaneling of the juries. The assertion by the defendants that the qualified jurors were chosen by the Clerk, rather than by the Clerk and Jury Commissioner is unfounded; rather the affidavit discloses that the Jury Commissioner did in fact participate in selecting the jurors.

The evidence submitted to the Court in support of this motion shows that the grand jury which returned the indictment against these defendants and the veniremen of the petit jury were properly selected in accordance with the statutory requirements and that there was no discrimination in the selection of the jurors.

The defendants have not shown any violation of the statute pertaining to the selection of the grand jury or petit jury.

Opinion of Court

Even if the W. G. J. selection of the grand jury or petit jury, as alleged in the motion, had disclosed some irregularity (which it did not) the defendants failed to show whereby such purported irregularity would be a violation of their constitutional rights under any 72 of the provisions of the United States Constitution.

Nor did they show that any such irregularity, if any existed, was a violation of their constitutional rights. Nor did they show that the alleged irregularity did violate any of their constitutional rights. Nor did they show wherein any prejudice could have resulted to the rights of these defendants under the facts as here presented.

The motion to dismiss the indictment will, therefore, be denied.

Rule 27 of the Rules of Criminal Procedure as established by the United States District Court for the Eastern District of Illinois provides:

“(1) A plea in abatement to an indictment directed against the legality of the grand jury returning said indictment shall not be entertained by the court unless the same shall have been filed within 10 days from the date of the return of the indictment; provided, however, that in the event the defendant has not been apprehended at the time the indictment is found such plea shall be filed within 10 days after his apprehension, unless he or his counsel shall sooner have been apprised of his indictment, in which case the plea shall be filed within 10 days after he or his counsel shall have been apprised of his indictment.

“(2) A motion to quash an indictment or an information shall not be entertained by the court, unless the same shall have been filed within 10 days from the date of the return of the indictment or of the filing

Motion for New Trial

of the information, or of defendant's apprehension, except for good cause shown."

In this case the indictment was returned against the defendants in 1957. Subsequent to the return of the indictment counsel for the defendants asked for and were granted additional time to file their motions, which they did.

73 The defendants aver that they did not have the information contained in the affidavit of the Jury Commissioner during the intervening period. There was, however, no showing that any request was made to the Jury Commissioner for the affidavit until it was effected in May of 1959.

The Court finds that defendants did not file their motion as required nor have they shown good cause for failing to file their motion within the time prescribed by the rules or within the extended time granted by the Court. Having failed to meet the requirements of the rules, the motion to dismiss should, for this further reason, be denied. For the above and foregoing reasons the Court will deny the motion to dismiss.

The above and foregoing shall be considered findings of fact and conclusions of law as requested by the defendants in their motion.

(s) William G. Juergens,
United States District Judge.

Dated: May 12, 1959.

MOTION FOR NEW TRIAL.

74 Now come the defendants, Thomas D. Clancy, James A. Prindable, and Donald Kastner, by their attorneys, John F. O'Connell and Paul P. Waller, Jr., and re-

Motion for New Trial

spectfully move this court to vacate and set aside the verdict returned against them in this cause, and to grant the defendants a new trial on Counts I, III, IV and V upon each and all of the following grounds:

1. That the court erred in failing to dismiss the Indictment against these defendants pursuant to the Motion to Dismiss filed by these defendants on August 14, 1957.

2. That the court erred in refusing to grant these defendants' Motion for Return of Property and to Suppress Evidence.

3. That the court erred in denying the motion of the defendants for permission to inspect the transcript of the evidence and record of the foreman of the Grand Jury.

4. That the court erred in failing to grant the defendants' Motion for Bill of Particulars requested by said defendants prior to trial, and thereby caused defendants to be surprised at their trial by the evidence produced against them.

5. That the court erred in refusing to grant the motion of these defendants to produce a list of veniremen and witnesses in advance of trial.

6. That the court erred in failing to dismiss the Indictment against these defendants pursuant to Motion to Dismiss filed by these defendants on April 24, 1959.

75 7. That the court erred in failing to dismiss the Indictment against these defendants pursuant to the Amended Motion to Dismiss filed by these defendants on May 8, 1959.

8. That the court erred in refusing to grant motion of defendants to produce list of veniremen at commencement of trial.

9. That the court erred in refusing to grant the Motion for Return of Property and to Suppress Evidence filed by

Motion for New Trial

these defendants after the jury was sworn at the commencement of the trial in this cause.

10. That the court erred in refusing to grant defendants' Motion for Acquittal filed by these defendants after the close of the Government's case.

11. That the court erred in refusing to give Defendants' Requested Instructions in the form submitted by them, and which Instructions are made a part hereof by reference.

12. That the court erred in overruling the objections of the attorneys for defendants to the closing argument of the attorney for the United States who stated, "It is interesting to note that the only evidence produced by the defendants was the wagering stamp", which was improper argument, prejudicial as being a direct reference to the fact that the defendants did not testify and could only be so construed by the jurors.

13. That the court erred in giving the Requested Instructions submitted by the United States and as objected to by these defendants, and which Instructions are made a part hereof by reference.

14. That the evidence is not sufficient to sustain a verdict of guilty against these defendants.

15. That there is no substantial evidence of the defendants wilfully attempting to evade and defeat wagering taxes in a substantial amount for the periods alleged in the Indictment.

16. That the verdict is against the manifest weight of the evidence.

17. That the verdict is contrary to the weight of the evidence.

76 • 18. That errors of law occurred during the trial in this court's rulings on the admissibility of evidence

Motion for New Trial

to which either objections were made, and to which it was made known to the court the action which the defendants desired the court to take.

19. That the verdict of the jury was contrary to law.

20. That the verdict of the jury was not supported and justified by competent evidence.

21. That the verdict of the jury was the result of passion and prejudice.

22. That the court erred in refusing to define in its Instructions the meaning of the word "agent."

23. That the court erred in not holding, as a matter of law, and in not instructing the jury, as a matter of law, that the defendants were not guilty of attempting to evade and defeat payment of a substantial amount of the 10% wagering taxes for the period set forth in Count IV and Count V of the Indictment.

24. That the court erred in not holding, as a matter of law, and in not instructing the jury, as a matter of law, that the defendants were not guilty of conspiracy as alleged in Count V of the Indictment.

25. That the court erred in not holding, as a matter of law, and in not instructing the jury, as a matter of law, that the defendants were not guilty of making false statements of a "material fact" to Internal Revenue Agents during the course of an investigation made by said agents.

26. That the court erred in instructing the jury that the statements alleged to have been made by these defendants in Counts I and III of this Indictment were "material" to the investigation being conducted by said agents at the time and place alleged in said Indictment.

27. That the court erred in admitting in evidence all Exhibits offered by the Government in that said Exhibits

Motion for New Trial

were obtained by illegal search and seizure; constituted the private books and records of these defendants; that no proper foundation was laid for the admission of said Exhibits into evidence; that said Exhibits were incompetent, immaterial and irrelevant and failed to prove the issues in this cause.

77 28. That this court erred in not refusing to strike Exhibits 112, being a cardboard box, and all the contents of said box, since the Government failed to prove that the contents of said box, being Exhibits 112a et seq., were in the same condition at the time they were admitted into evidence as they were at the time they were seized by illegal search warrant on May 6, 1957.

29. That the court erred in receiving into evidence the income tax records of the defendants since said records were incompetent to prove any of the issues in this cause.

30. That the court erred in refusing to inquire whether said individual veniremen "believed gambling to be morally wrong."

31. That the court erred in refusing to ask each juror individually during voir dire examination "whether or not they had a prejudice against any one accepting wagers."

32. That the court erred in refusing to ask the veniremen during voir dire examination, who admitted they taught Sunday school, what denomination they belonged to.

33. That the court erred in refusing to allow defendants' Motion to Dismiss and to strike the array of jurors after the selection of the jury.

34. That the court erred in refusing to ask the veniremen during voir dire examination if they could give the defendants a fair trial even though they were guilty of a violation of a state law.

Motion for New Trial

35. That the court erred in refusing to instruct the jurors that statements made by Thomas D. Clancy could not be considered as admissions against the other defendants in this cause.

36. That the court erred in refusing to instruct the jurors that statements made by Donald Kastner could not be considered as admissions against the other defendants in this cause.

37. That the court erred in refusing to instruct the jurors that statements made by James A. Prindable could not be considered as admissions against the other defendants in this cause.

38. That the court erred in receiving and admitting into evidence documents which were not described in the search warrant issued by this court.

39. That the court erred in admitting into evidence documents which were not identified in the return of the search warrant issued in this cause for the second floor premises of 2300a State Street, East St. Louis, Illinois.

40. That there was a substantial variance between the competent evidence presented by the Government and the Indictment returned against these defendants.

41. That the court erred in submitting an improper form of verdict to the jurors and in particular for instructing the jury to return a verdict against James F. Prindable when the defendant was described in the Indictment as James A. Prindable.

42. That the court erred in refusing to require the Government to produce statements and reports in its possession which were made by Government witnesses to an agent of the Government, for inspection, which documents related to the subject matter as to which the witnesses

Motion for New Trial

had testified, for use by the defendants for cross-examination, or in the alternative to strike the testimony of said witnesses and to instruct the jury to disregard the same.

43. That the court erred in admitting Government's Exhibits 47, 48, and 49, being the telephone bills of Eugene Burns, when said witness testified that his telephone had never been used for the purpose of accepting wagers, and also for refusing to strike said wagers.

44. That the court erred in admitting into evidence Government's Exhibits 54 through 109, in that no proper foundation was laid for their admission, and the court further erred in allowing George Mochel to testify what said records "represent to me", since said witness failed to testify that he had verified the recapitulation of figures used in United States Exhibits 54 through 79, inclusive, from the original records for the period March 1, 1957, to March 30, 1957, inclusive.

45. That the court erred in inquiring of the Government witness, Mochel, "If you had no evidence of a layoff bet you couldn't differentiate between the two, could you?"

46. That the court erred in refusing to strike the United States Government Exhibits 15, 15a, 16, 17, 18, 20, 21, 22, 23, 25, 25a, 26, 27 and 28.

79 47. That it has come to the attention of the attorneys for the defendants that one of the jurors selected in this cause admitted prior to his examination on voir dire that he was personally prejudiced against anyone accepting wagers, but testified during voir dire examination by this Honorable Court he was not prejudiced against anyone accepting wagers. Further, defendants desire to produce testimony of this fact at the hearing on this motion.

Dated this 22nd day of May, 1959.

Motion for Judgment of Acquittal Notwithstanding, etc.

**MOTION FOR JUDGMENT OF ACQUITTAL
NOTWITHSTANDING THE VERDICT.**

80 Now come the defendants, Thomas D. Clancy, James A. Prindable and Donald Kastner, by their attorneys, John F. O'Connell and Paul P. Waller, Jr., having been given by the Court ten (10) days in which to file motions after the verdict of the jury, and respectfully move the Court that having moved the court for judgment of acquittal at the close of the Government's case, and having offered no evidence therein, do hereby renew said motion. The defendants, Thomas D. Clancy, James A. Prindable and Donald Kastner, were entitled to Judgment of Acquittal in their favor at the time they moved for the same at the completion of the Government's case for the following reasons:

1. That it conclusively appeared that there was no substantial and competent evidence that warranted the jury in finding the defendants guilty beyond a reasonable doubt.

2. That the Indictment against the defendants should have been dismissed because it was predicated upon evidence seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States and the defendants renew their motion heretofore made for said dismissal.

3. That the evidence seized constituted private books and records of the defendants and the use thereof before the grand jury constituted a violation of the Fifth Amendment to the Constitution of the United States.

4. That the defendants renew their motion heretofore made for the dismissal of the Indictment on the grounds that the Indictment and each Count thereof failed

81 to state with reasonable certainty facts necessary to constitute an alleged crime against the United States.

Motion for Judgment of Acquittal Notwithstanding, etc.

5. That the Indictment and each Count thereof was vague, ambiguous and indefinite and does not sufficiently state the commission of a criminal act by these defendants against the United States.

6. That the Indictment and Counts mentioned heretofore allege conclusions of law rather than statements of ultimate facts and, therefore, does not state facts with sufficient certainty to advise the defendants of the nature and cause of the accusations as required by the Sixth Amendment to the Constitution of the United States to enable them to prepare their defense thereto, nor to characterize the purported offense as a violation of the statute herein alleged.

7. That Chapter 35, Subchapter A, Internal Revenue Code of 1954 is unconstitutional in that it violates the Fifth and Tenth Amendment to the Constitution of the United States.

8. That defendants without waiving any of the objections heretofore found to said Indictment charge that Count IV of the Indictment and Subparagraphs 2, 3, 5, 6 and 7 thereunder repeat the allegations contained in Counts I, II, and III, and seek to charge two separate offenses arising out of the same set of facts.

9. That Count V of the Indictment fails to set forth any facts sufficient to constitute a violation of Title 18, Section 371, U. S. Code, in that said Count fails to set forth any of the acts sufficient to constitute a conspiracy; that none of the overt acts alleged could by intendment or innuendo constitute any efforts to further a conspiracy, confederation or agreement.

10. That the defendants renew Paragraph 19 of their original Motion to Dismiss the Indictment and renew their Amended Motion to Dismiss that the members of the Grand Jury which returned this Indictment against

Order of Court

the defendants were not selected, drawn or summoned according to law, and that a sufficient number of legally qualified Grand Jurors did not concur in finding an Indictment against the defendants.

11. That there was not sufficient legal or competent evidence produced before the Grand Jury which found the Indictment against the defendants, upon which an Indictment could be returned against the defendants.

82 12. That the defendants renew their motion made to dismiss the Indictment on the grounds that the defendants were denied a speedy trial as guaranteed to them by the Constitution of the United States and the Fourth Amendment thereto.

Dated this 22nd day of May, 1959.

ORDER OF COURT.

83 The Court, having considered the defendants' Motion for Judgment of Acquittal Notwithstanding the Verdict and the defendants' Motion for New Trial, having heard testimony in support of their Motion for New Trial, having read the briefs of the defendants in support of their respective motions and the Government's briefs in opposition thereto, having heard oral arguments in open court, and being fully advised in the premises, finds that the above motions should be denied.

It Is, Therefore, the Order of this Court that the defendants' Motion for Judgment of Acquittal Notwithstanding the Verdict and the defendants' Motion for New Trial be and the same are hereby respectively denied.

(s) William G. Juergens,
United States District Judge.

Dated: July 7, 1959.

Opinion of Court

OPINION OF COURT.

84 The Court has considered the defendants' Motion for Judgment of Acquittal Notwithstanding the Verdict and the defendants' Motion for New Trial, has heard testimony in support of their Motion for New Trial, has read the briefs of the defendants in support of their respective motions and the Government's briefs in opposition thereto, has heard oral arguments in open court, and being fully advised in the premises, finds that the respective motions should be denied.

As one of the reasons for their Motion for New Trial, the defendants assert that one of the jurors selected in this case stated privately, prior to his examination on voir dire, that he was personally prejudiced against anyone accepting wagers but on his voir dire examination by this Court stated that he was not prejudiced against anyone accepting wagers.

In an attempt to show validity of this allegation the defendants called one Mrs. Vera Simmons to the stand.

85 Mrs. Simmons testified substantially as follows: that while she was seated in the jury box, a person seated on one side or the other of her made the statement to her that this person felt the same as did Mrs. Simmons. This statement was made subsequent to a statement by Mrs. Simmons to the Court that she was prejudiced against persons who accepted wagers. Mrs. Simmons was excused from the jury panel. Mrs. Simmons further testified she did not know where the person sat to whom the statement is attributed and she does not know whether he sat as a juror in this case. Thus, it would appear that there was an absolute failure to support the allegation of the defendants, aside from the mere allegations of the defendants in their Motion for New Trial.

Opinion of Court

Defendants' attorneys in a conference in chambers, on other matters during the progress of the trial, in a conversational manner told the Court they heard that the above matter had taken place but did not and could not give the name of the prospective juror who is supposed to have said it and could not and did not give the name of the prospective juror to whom it was said. In fact, on the day the motions were first supposed to be heard the defendants subpoenaed the wrong prospective juror and on the day that the motions were heard subpoenaed Mrs. Simmons.

The Court, at the time he was advised in a conversational manner relative to the above, advised counsel for the de-

86 defendants that there was nothing before the Court on which the Court could act at that time. The de-

fendants did not make any motion or request permission to present any evidence in support of their allegations. They did not further pursue the alleged charge of prejudice of a juror until after a verdict of guilty had been returned and then for the first time raised the question by motion and requested permission to present any evidence to support their allegations as to the propriety of the juror who it is alleged made the prejudicial statement. In *United States v. Evett*, 65 F. Supp. 151, wherein it was alleged that improper statement had been alleged which may have influenced the verdict of the jury, the Court there said:

“When knowledge of any such irregularity is known to counsel, he ‘may not sit by in silence, taking chances on a favorable verdict, and after a hostile verdict, then, for the first time, be heard to complain.’ ”

And further in *Strang v. United States*, 53 F. 2d 821, the Court said:

“The juror’s disqualification we have already held was waived by proceeding with the trial after learning of it.”

Notice of Appeal

In the latter case the juror who was challenged was clearly disqualified under the law of the state where the Court sat; yet the Court there said that objection to a juror propter defectum, his impartiality not being questioned, must be made before verdict and is not cause for a new trial. That case goes much further than the question here presented to this Court and is authority for this Court to consider in determining validity of the defendants' belated
87 motion challenging the qualifications of one of the jurors. Since the defendants failed to challenge the alleged prejudice of the juror in apt time and since they have failed completely to substantiate their charge, their Motion for New Trial based on this ground will be denied.

For the above and foregoing reasons the defendants' Motion for New Trial will be denied.

(s) William G. Juergens,
United States District Judge.

Dated:

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NOTICE OF APPEAL.

Name and Address of Appellants:

Thomas D. Clancy, 2401 Ridge Avenue, East St. Louis, Illinois.

James F. Prindable, 1741 Belmont, East St. Louis, Illinois.

Donald Kastner, 1510 North 49th Street, East St. Louis, Illinois.

Name and Address of Appellants' Attorneys:

John F. O'Connell, Suite 214 Murphy Building, East St. Louis, Illinois.

Paul P. Waller, Jr., Suite 214 Murphy Building, East St. Louis, Illinois.

Notice of Appeal

Offenses:

The Appellants, Thomas D. Clancy, James F. Prindable and Donald Kastner were convicted of a violation of Sec. 7201, Title 26, U. S. Code, and a violation of Sec. 371, Title 18, U. S. Code.

The defendants, Thomas D. Clancy and James F. Prindable were also found guilty of a violation of Sec. 1001, Title 18, U. S. Code.

Judgment and Sentence:

On July 7, 1959, the United States District Court for the Eastern District of Illinois denied Defendants' Motions for Judgment of Acquittal Notwithstanding the Verdict, and the Defendants' Motions for New Trial, and said court, on July 22, 1959, denied Defendants' Motions to Suspend the Imposition of Sentence and to Admit Defendants to probation, and did at that time enter the following judgment and sentence, to-wit:

Thomas D. Clancy was sentenced to four years imprisonment on each of three Counts of the Indictment, said sentences to run concurrently, and in addition thereto, he was fined the sum of \$5,000 on Count IV of the Indictment and ordered to pay one-third the court costs in this proceeding.

James F. Prindable was sentenced to three years imprisonment on each of three Counts of the Indictment, said sentences to run concurrently, and in addition, thereto he was fined \$2,000 on Count IV of the Indictment and ordered to pay one-third the court costs in this proceeding.

99 Donald Kastner was sentenced to three years imprisonment on two Counts of the Indictment, said sentences to run concurrently, and in addition thereto was fined the sum of \$2,000 on Count IV of the Indictment

Appearances

and ordered to pay one-third court costs in this proceeding.

The Defendants, Thomas D. Clancy and Donald Kastner, have filed bail and are not confined in any institution. The Defendant, James F. Prindable, is not presently confined in any institution, but will surrender to the United States Marshal for the Eastern District of Illinois on July 31, 1959.

We, the above-named appellants, hereby appeal to the United States Court of Appeals for the 7th Circuit from the above-stated judgment.

Dated this 31st day of July, 1959.

Thomas D. Clancy,
James F. Prindable,
Donald Kastner.

John F. O'Connell,
Paul P. Waller, Jr.
O'Connell & Waller,
Attorneys at Law,
Suite 214 Murphy Building,
East St. Louis, Illinois,
Attorneys for Defendants.

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TRANSCRIPT OF PROCEEDINGS.

Present: Honorable William G. Juergens, United States District Judge, Presiding.

Attorneys for Government: Mr. C. M. Raemer, United States District Attorney, Mr. Robert D. McKnelly, Mr. James B. Moses and Mr. Sheldon Green, Assistant United States District Attorneys.

Attorneys for Defendants: Mr. John F. O'Connell and Mr. Paul P. Waller, Jr., East St. Louis, Illinois.

Questions on Voir Dire

Now, on this 11th day of May, 1959, this cause coming on for hearing, a jury having been selected and sworn to try said cause, the following proceedings were had, that is to say:

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Voir Dire.

Mr. O'Connell: At this time, the defendants, Clancy, Prindable and Kastner, move the Court to ask the prospective jurors the following questions in the impaneling jury:

1. Do you believe that gambling itself is immoral, per se, or morally wrong?

2. Do you teach Sunday School? and

3. To what denomination, if any, do you so teach? The reason is there are certain sects that insist that gambling is one of the most heinous of crimes.

4. We also ask that the Court ask the jurors if they can give these defendants a fair trial even though the evidence shows that the laws, gambling laws, of the State of Illinois were violated.

The next question we would ask the Court to propound to the jurors is:

5. Can you keep separate the violations of the law with which they are charged in the indictment, that is, the laws of the United States separate and apart from the violation of the State laws?

6. Do you have a prejudice against people engaged in the business of operating horse books? and

7. Would you be prejudiced against anyone who accepts wagers?

(The Court refused to ask questions 1, 3, 4, 5, and 6, but did ask the jurors questions 2 and 7.)

Testimony of Joseph M. Heckelbech

Testimony of Joseph M. Heckelbech.

117 **JOSEPH M. HECKELBECH,**

was then called as a witness for the government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Joseph M. Heckelbech, and I am employed by the United States Treasury Department as Chief of the Collection Division Office of the District Director of Internal Revenue, Springfield, Illinois; Govern-
118 ment's Exhibits 1 through 10, are Form 730, return tax on wagers. They were filed in the office of the District Director of Internal Revenue at Springfield, Illinois, and have remained in the files there.

Q. Do they constitute a part of the records maintained by the District Director of Internal Revenue?

A. Yes, sir, they do.

Mr. McKnelly: We offer in evidence Government's Exhibits 1 to 10, inclusive, your Honor.

Mr. O'Connell: We object to them. No foundation has been laid to show that they are the records of the defendants.

The Court: Overruled. They will be admitted.
119 Exhibits 11 through 14 are applications for special stamps for wagering. They are part of the files of the District Director at Springfield, and they are maintained as part of the District Director's records.

Mr. McKnelly: Whose signature purports to appear on each of the documents 1 through 14?

Mr. O'Connell: The questions involve hearsay. He wouldn't know that, except only as to what the standard practice is or by conversation.

The Court: Overruled.

Testimony of Joseph M. Heckelbech

All of these returns and applications are over the signature of Thomas D. Clancy.

Mr. McKnelly: We offer them in evidence as Government's Exhibits 11 through 14, Your Honor.

Mr. O'Connell: There is no testimony as to that, and these records obviously are not, on their face, in the same condition as when they were received. There are erasures and interlineations and cross-out marks.

120 The Court: Sustained.

Mr. McKnelly: Can the witness explain the statements pertaining to the purported documents offered in evidence?

Mr. O'Connell: We object to the leading question.

The Court: Overruled.

The stamp with the large 37 at the head of the caption "received", that is known in our office as received stamps on the day the return was received in our office; the thing would then be stamped, and here is the date (indicating on Exhibit) the money is paid; the returns are taken into our account, and then put in the Journal, and this identifies the date the return was mailed to the Federal Reserve Bank, and taken into the account and charged to the District Director, which is then his responsibility to the United States Treasury.

Mr. O'Connell: I renew my objection in view of the fact it is obvious on the face that they are not now in the same condition as when received by the Government.

The Court: Overruled. The Exhibits will be admitted.

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127 **Cross-Examination**, by Mr. O'Connell.

I have no information other than what I have told you about the records, and I have no knowledge whether the signatures appearing on the records are the signatures of Thomas Clancy. I see the cross-out marks, erasures and

Testimony of Joseph M. Heckelbech

writing on Government's Exhibits 11, 12, 13 and 14; I
128 can not tell you whether or not that was done by the
Government after it arrived at our office. I have no
way of knowing whether or not the Exhibits are in the
same condition when they left our custody, and I do not
know when the "at large" was crossed out. I am not a
technician, so I would not know what the phrase, "at
large" indicates. I am here as the head of the Collection
Division; to my knowledge, there is nothing wrong with
operating "at large"; if "at large" was crossed out on
the application, the taxpayer would not be issued a stamp
so far as the address shown on the return is con-
129 cerned; I am not aware that the taxpayer was issued
a stamp in this case; no, there would not be a stamp
issued "at large", and an address to a street also. A
stamp would permit him to do business "at large" or at
a given address, but not at both. When an "at
130 large" application is rejected, we advise them that
they can't have the stamp with that type of applica-
tion, and ask them to correct it; and when the corrections
are made, the stamp is issued accordingly. It has to be
determined whether the taxpayer intends to have his
stamp issued as an operator "at large" or to a given
address. A stamp can't be issued which would cover
both, and the taxpayer would have to give us the informa-
tion before we issued the stamp. The application for the
special stamp must be in order by the statute before
131 we can issue it. The law does not provide for place
of residence or business. It provides for the address
of the place where the business is to be carried on. Ex-
hibit 12 does call for the address, residence, and it is
listed as 2401 Ridge, and the "at large" is crossed out
as being the place of business. The "at large" one place
or another would be considered the place of business; in
the application we do ask for the place of residence and

Testimony of George W. Kienzler

the application doesn't say where the place of business is;

but, I would not say this application would be in
132 order if it was an "at large" application, and I would
not issue a stamp on that basis; and, if I did issue

a stamp, I would say I was wrong. The expression,
"journalized", July, and so forth, represents the date the
money was put in the bank, and indicates our accounting
procedures or methods. I do not think the stamp is
issued the day the return is made. We do not deposit the
money if the application is not in order, but hold it in
suspension until the document has been corrected.

133 If there is a rejection by the Government, we try to
clear up the difficulty by correspondence, and if
it can't be cleared up by correspondence, one of our field
men calls on the taxpayer, and asks the taxpayer to cor-
rect it. I don't know whether or not this taxpayer was
ever advised that something was wrong with his applica-
tion. The fact that the stamp was issued would indicate
to me that everything was in order. I wouldn't make
the conclusion that the taxpayer was not advised that any-
thing was wrong, but from the Exhibit and from the
records, the taxpayer wasn't advised that anything was
wrong.

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137 Testimony of George W. Kienzler.

GEORGE W. KIENZLER

was then called as a witness for the Government, and being
first duly sworn, testified as follows:

Direct Examination, by Mr. McNelly.

My name is George W. Kienzler; I am a Special Agent
of the Internal Revenue Service, presently sta-
tioned in Chicago. I have been with the Inter-

Testimony of George W. Kienzler

nal Revenue Service since 1951. I recall May
6, 1957; at about 11:00 a.m. on that date, I was
138 at or near the premises of 2300 State Street, East
St. Louis, Illinois to serve a search warrant on the
premises located at 2300a State Street. The Govern-
140 ment's Exhibit 29a is a document consisting of 4
pages, which is the original search warrant which
I served at the premises at 2300 State Street. The last
two pages is the return which I made on the search war-
rant.

Mr. McKnelly: We offer in evidence Government's Ex-
hibit 29a, the search warrant on these premises at 2300
State Street, East St. Louis.

Mr. O'Connell: We object to the admission into evi-
dence Government's Exhibit 29a on the ground that the
search warrant was illegally issued; that it shows no prob-
able cause on the defendants; that it calls for the search
and seizure of private records which is contrary to the
law under the Fourth and Fifth Amendments to the Con-
stitution of the United States.

The Court: Objection is overruled. This court here-
141 tofore passed upon the legality of the search war-
rant and the issuance thereof, and Government's
Exhibit 29a will be admitted for the reason previously
stated at the time the matter was passed upon, when there
was objection to the testimony of the witness unless the
search warrant was in evidence. The objection is over-
ruled and the exhibit admitted.

Mr. O'Connell: It was not directed to the man or men
who made the search.

The Court: Overruled. The court previously passed on
this question.

142 I searched the premises along with two or three
other agents, Mr. Minton, Stalhorn and Walsh. The
building was situated at 23rd and State, East St. Louis;
a brick building, 2 stories, and a ground floor—

Testimony of George W. Kienzler

Mr. O'Connell: We object to any reference to the ground floor. The search warrant only calls for the search of the second floor.

The Court: He may answer.

The ground floor houses a tavern called Zittel's Tavern. The upstairs is laid out in the form of apartments. We searched the apartment, and particularly one room of it, but our general search included the whole area.

When we made the search of the apartment,
143 Mr. Zittel, Mr. Witherspoon and Donald Kastner were in the apartment.

Mr. McKnelly: Mr. Kienzler, can you state to the court and jury the nature of some of the documents that you seized at the time of the raid?

Mr. O'Connell: We object to any reference to the nature of the documents seized unless there is some connection made with the defendants, and unless a proper foundation is laid for the documents.

Mr. McKnelly: I am willing to have them admitted at the proper time and will ask that they be admitted.

The Court: Overruled.

There were many documents, a number of publications called racing forms, scratch sheets, columnar paper, white and yellow paper, and small sheets of paper with
145 notations on them small leaves. Government's Exhibits 54 through 79 are documents taken from 2300a State Street, East St. Louis, Illinois on May 6, 1957; they were taken from an upstairs room, which was the third room from State Street back on 23rd Street, in a buffet in the lower right hand part of the buffet with a number of other documents. I had a conversation with Mr. Kastner; I asked Mr. Kastner what he was doing there. He replied—

146 Mr. O'Connell: We object to what Mr. Kastner replied. It would only be binding on him, if at all,

Testimony of George W. Kienzler

and we object to any conversation with him. We object to any of the conversation with Mr. Kastner as not being binding upon the defendants, Prindable and Clancy.

The Court: Overruled.

Mr. Kastner replied he was just waiting for one 147 or more phone calls. Mr. Ira Minton was present when I had this conversation, and Mr. Zittel was in and out of the premises. The Mr. Zittel I am referring to was an old man whose name I think was Henry.

Mr. McKnelly: I would like to offer into evidence Government's Exhibits 54 through 79, having been identified and seized by the witness.

Mr. O'Connell: We object to them. There is no connection with the defendants, no proper foundation laid and no proof of what those represent. They are an intelligible bunch of figures, and there has been no foundation laid here to connect them up with the defendants in this case at this time, and they are not properly described in the search warrant.

The Court: The objection is overruled, and the Exhibits are admitted.

Mr. O'Connell: For the record, we want to object to this, because obviously, on their face they are the 148 private books and records of the defendants and as such are protected from search and seizure under the Fourth and Fifth Amendments of the Constitution of the United States.

The Court: Overruled.

Government's Exhibits 80 through 105, a total of 26 documents, were first seen by me on the second floor of 2300a State Street, and were there seized by me on May 6, 1957.

Mr. McKnelly: We offer into evidence Government's Exhibits 80 through 105, Your Honor.

Mr. O'Connell: We object for the same reasons we pre-

Testimony of George W. Kienzler

viously stated to the other Exhibits, and for the further reason that this witness has not testified said Exhibits are in the same condition as when they were seized by him, and for the further reason that Exhibits 80 through 105 are not pertinent to any issue in the case, and are
149 irrelevant and immaterial and are speculative, since they do not relate to the month of March, 1957, and should be limited to and including March 30th.

The Court: The objection is overruled. The Exhibits will be admitted.

Government's Exhibits 106 through 109 were seen by me first on May 6, 1957, at the apartment at 2300a State Street, East St. Louis, and seized by me on that date.

Mr. McKnelly: We offer in evidence Government's Exhibits 106 through 109.

Mr. O'Connell: We make the same objection we previously made with the added objection I made to
150 the last Exhibits.

The Court: The same ruling. Overruled, and Exhibits are admitted.

Government's Exhibit 110, consisting of 29 pages, was seen by me among the papers taken from 2300a State Street, East St. Louis, on May 6, 1957, and taken by me personally.

Mr. McKnelly: We offer in evidence Government's Exhibit 110.

Mr. O'Connell: Same objection previously made, and with reference to the apartment, there has been no
151 proof as to who lives there.

The Court: Overruled. Exhibit 110 will be admitted.

Government's Exhibit 111 can be identified by me. I first saw it at 2300a State Street, East St. Louis, on May 6, 1957. As I recall it, this is still the same form as when I took it or when I checked it.

Mr. McKnelly: We offer in evidence Government's Exhibit 111, Your Honor.

Testimony of George W. Kienzler

Mr. O'Connell: Same objection, your Honor, the contents inside, whether formerly in this room, there is no evidence as to that and we don't know what's in there, and it is immaterial and irrelevant and we object on the further ground this is a package in which the contents have not been examined by the United States Attorney, I don't think, or counsel for the defendants. We have had no opportunity to examine it.

The Court: You may examine it.

152 Mr. O'Connell: I don't understand. He is just identifying the cover at this time?

Mr. McKnelly: He is just identifying the package.

The Court: The objection will be overruled and Exhibit 111 will be admitted.

Mr. O'Connell: I will withdraw the objection, Your Honor.

The Court: Very well. Objection withdrawn. You may proceed.

This box or carton with packages marked Government's Exhibit 112, was seized by me. I first saw the carton in the apartment at 2300a State Street at East St. Louis, Illinois on May 6, 1957. The carton is in substantially the same condition it was when I first found it.

Mr. McKnelly: We offer in evidence Government's Exhibit 112, your Honor.

Mr. O'Connell: The same objection previously made to all these exhibits. He is only identifying the cover, is that correct?

153 The Court: That is correct, it will be admitted.

Mr. Ira Minton was with me at the time of the interview with Mr. Kastner. Mr. Walsh and Mr. Strubuhan was in and around there, and Mr. Zittel was more or less in and out of the room during the time of the interview. When I entered the room, I identified myself to Mr. Kastner; told him I had a search warrant, showed him the copy of it, and explained I would leave a copy with him when I had finished—

Testimony of George W. Kienzler

Mr. O'Connell: We object to any conversation with Mr. Kastner, and ask that it be restricted to Mr. Kastner
154 only if it be admitted at all. It can't be used as any evidence against the other two defendants in the case.

The Court: Overruled.

I asked him what he was doing there. He replied he was waiting for one or more calls. I asked if he had a wagering stamp or occupational tax stamp, and he said he didn't have one personally but that the partnership, the North Sales Company, had a stamp, and that Thomas Clancy took care of it.

Mr. O'Connell: May I ask that the same objection previously made carry throughout this testimony?

The Court: Yes, let the record so show. Proceed. The objection is overruled.

In response to my question, Mr. Kastner more or less stated he was a partner of the North Sales Company.

Mr. O'Connell: We object to the more or less, Your Honor.

155 The Court: Sustained.

He stated that in substance.

Mr. O'Connell: We object to that.

The Court: He may proceed.

He stated that he was a partner of the North Sales Company; that he served as a clerk and worked on a commission of the profits; that Thomas Clancy and James Prindable were the other partners of North Sales Company. He stated that he, himself, did not have anything to do with the records and that Tom took care of that.

Cross-Examination, by Mr. O'Connell.

156 The apartment, as far as I know, was the apartment of the elderly man named Zittel. They called him "old man Zittel" to distinguish him from his son, Henry.

Testimony of George W. Kienzler

I had no knowledge that Mr. Zittel was running a
157 book. I never investigated that myself. Mr. Zittel
lived in the apartment. As I displayed the items
inventoried, I asked Mr. Kastner whose they were, and his
reply was—

Mr. O'Connell: We object to what his reply was.

The Court: He may answer.

And he said that they must be Tom's. When I and the
other agents came into the apartment, we were
158 brought upstairs by Mr. Murphy, who pointed out
Mr. Kastner to me. * * * Four of us came in and we
were later joined by another man whom I forgot to
160 mention earlier. I did not determine at that time
that the North Sales Company did have a wagering
stamp. Yes, there is a reference in the search warrant
with reference to the avoiding of the payment of the \$50.00
tax. The search warrant commanded me to search the
premises and seize the items set forth in the docu-
161 ment, and I never determined personally whether or
not a stamp was issued, and I was the one that was
sent out to make the raid. In my capacity as Special
Agent, I am fairly familiar with special taxes and forms,
and so forth. I am familiar with the type of form such as
Government's Exhibits 11, 12 and 13.

162 Mr. O'Connell: With the "at large" in there, is that
considered a proper application?

Mr. McKnelly: Objection.

The Court: Sustained.

Mr. O'Connell: Would you have issued the special
stamp?

Mr. McKnelly: Objection.

The Court: Sustained.

163 Mr. O'Connell: Can you tell from the investigation
of Government's Exhibits 13 and 14; and from ex-
amination of Defendants' Exhibits 1 and 2 as to whether

Testimony of George W. Kienzler

the special tax stamp I show you as Defendants' Exhibits 1 and 2 were issued pursuant to that application?

Mr. McKnelly: Objection.

The Court: Sustained as being within the scope of the direct examination.

I can say that the documents I have seen here are in the same condition as when I seized them. The clerk put a mark on them, but so far as I can tell, they are the same. The apartment in question was obviously a private dwelling. I have been with the Internal Revenue Service since 1951; a Special Agent since 1953. Prior to 1953 I was a Revenue Agent and my duties were primarily auditing. I don't know a good definition of what a set of books is. They can be just about anything. So far as the auditing department of the Government is concerned, if we are looking for a set of books, we are looking for ledgers, daybooks, and invoices and things like that. There is a difference between books and records. From the standpoint of the Internal Revenue Service, a set of books would be records containing entries of business transactions, which properly show income and expenditures of the business. I do not think that there is a great difference between the Government's definition of a set of books and the commonly accepted term. I think a set of books contain entries of business transactions which show income and expenditures of the business operation. * * * At the time we seized these articles, I gave a receipt to Mr. Donald Kastner. He signed the receipt. I saw him sign the receipt.

Mr. McKnelly: We offer in evidence Government's Exhibit 112a.

Mr. O'Connell: We object on the ground it is not re-direct examination.

The Court: Overruled.

Testimony of Ira L. Minton

Recross-Examination, by Mr. O'Connell.

These items I have down here are merely signed by Donald Kastner and the typing was done by someone else in advance. The handwriting is mine. Mr. Kastner told me he was a clerk and a partner. This didn't appear incongruous to me. I did not explain to Mr. Kastner what a partner was.

Further Redirect Examination, by Mr. McNelly.

173 I took Government's Exhibits 54 to 112 to the Internal Revenue Building office here in East St. Louis. Then I re-examined some of the packages to better identify what they were, marked them and sealed them and delivered them to Mr. Frank Hudak, Supervisor of the East St. Louis office.

Further Recross-Examination, by Mr. O'Connell.

174 After I delivered them to Mr. Hudak, I don't know what happened to them.

Testimony of Ira L. Minton.

IRA L. MINTON

was then called as a witness for the Government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McNelly.

My name is Ira L. Minton and I am an Internal Revenue Agent and I live at Collinsville, Illinois. I have
175 been with the Internal Revenue Service since October 30, 1950. I have served in several capacities, Deputy Collector about three years. I have been an examining agent for the balance of the time. * * * At
176 the time of the raid on May 6, 1957, I did not have a conversation with Donald Kastner, but I overheard the conversation between he and Mr. Kienzler.

Testimony of Ira L. Minton

Mr. McKnelly: Would you state, Mr. Minton, to the best of your recollection, the substance of the conversation had at the time you have just mentioned?

177 Mr. O'Connell: We object to any conversation Mr. Minton had with Mr. Kastner on the ground that it would not be binding as to the defendants, Clancy and Prindable.

The Court: Overruled.

Mr. O'Connell: So I won't have to be interrupting all the time, may the record show our objections to the conversation to be the same as the objections previously made?

The Court: Yes, the record may so show. Proceed. . . .

178 Mr. O'Connell: At this time, Your Honor, pursuant to Chapter 18, U. S. C. A., Section 3500, I demand the production of any statements and reports made by the witness, Ira Minton, for the purpose of inspection and to use to facilitate the cross-examination of said witness, which relates to the subject matter this witness has testified to.

The Court: The request will be allowed in so far as Ira Minton wrote down contemporaneously with the making of any statement of the defendant, Kastner, to this witness. The request will be denied if the defendant is demanding any report this witness, Minton, made to his superiors or his superior officer subsequent to the conversation with the defendant, Kastner.

181 I did not take any notes at the time, but afterwards, I returned to the office and made a memorandum of the interview. The memorandum concerned the conversation that I have related here. . . . I was in the Miscellaneous Tax Division from 1953 to October, 1958. I was assigned to assist in the raid. Currently, I am examining income tax amended returns to which Division I changed in October, 1958. When I was with the Miscellaneous Tax Division I audited excise tax

182

Testimony of Ira L. Minton

returns. Tax on wagers would come within my Division.

I am familiar with Form 730. I am familiar with
183 the form of Government's Exhibits 2, 4, 6, 8 and 10,
but not with these particular returns.

Mr. O'Connell: Referring to Government's Exhibits 5,
6, 7, 8, 9, 10, 3, 4, 1 and 2, I will ask you, are you familiar
with the term, "at large"?

Mr. McKnelly: Objection, Your Honor.

The Court: Sustained.

Mr. O'Connell: I show you what is marked Defendants'
Exhibits 1 and 2 and ask if you can tell the court and
jury from looking at the stamps and Government's Ex-
hibit if these stamps were issued pursuant to that appli-
cation.

Mr. McKnelly: Objection.

The Court: Sustained.

184 No arrests were made to my knowledge at the time
of the raid. My duty is not to arrest, mine is to
cover the situation. It was not my duty to make an arrest.
I do not know whose duty it was to make an arrest. I am
not authorized to make arrests. I was merely there as a
witness and to assist the agents in charge. I am not aware
of the extent of the other agents' authority to make

185 arrests. I have been with the Government since
1951. With reference to the Internal Revenue, set
of books may be any sort of record which is used for the
determination of a person's income. Generally speaking,
in accountancy, a set of books is a daily record, journal
and ledger accounts, and daily invoices are supporting
evidence, which is used and goes into the set of
186 books. The ledger is the pertinent record of the
transaction. I could not say the true reason for the
number on Government's Exhibits 1 to 10 appearing on the
right hand side just below the writing. I don't know what
the number represents.

Testimony of Wilbur Buescher

Mr. O'Connell: The identical number appears on the special tax stamp?

Mr. McKnelly: We object to any testimony as to that.
The Court: Sustained.

Mr. O'Connell: At this time I would like to request for the purpose of examination any statement that he made relative to summarizing the information given to him or taken by him in the interview with Donald Kastner.

The Court: If the witness made the notes contemporaneously with the giving of the statement by the
187 defendant, Kastner, to this witness you may have it.

Any statement referred to by the witness made subsequent thereto and delivered to his superiors, you may not have.

Mr. O'Connell: The information concerning the interview with Mr. Kastner and which you overheard, you later on prepared a memorandum? It stated what the conversation was?

It stated my knowledge of the conversation.

Mr. O'Connell: I renew my request, Your Honor.

The Court: We have gone over this several times. The law says made contemporaneously with and not subsequent. If you are going into that matter from that standpoint, the objection will be sustained.

Testimony of Wilbur Buescher.

WILBUR BUESCHER

was then called as a witness for the Government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

188 My name is Wilbur Buescher and I am an Internal Revenue Agent employed at East St. Louis, Illinois, and I have been with the service since June of 1951. On December 13, 1956, I accompanied Revenue

Testimony of Wilbur Buescher

Agent Martin Mochel to the office of Mr. Waller, Book-keeping Service Company, in the Murphy Building, East St. Louis, where I met Thomas Clancy, a partner of the North Sales Company; at that time, a conversation
189 was held between Mr. Clancy and Mochel, and I was present during the conversation, in addition to Press Waller and his partner, William Kealey, and I took an active part in the conversation.

Mr. McKnelly: Will you please state to the court and jury what Mr. Clancy said during the course of the interview?

Well, the questions—

Mr. O'Connell: We object to any reference or to any testimony concerning a conversation with Mr. Clancy. It is not binding upon the other two defendants in this case, Prindable and Kastner, Your Honor.

The Court: Overruled.

The questions related to Form 11-C, Application for Federal Wagering Stamp, and also to the operation of the business; among the questions asked was the partners in the North Sales Company, and Mr. Clancy replied that he, James Prindable and Donald Kastner were
190 partners; he stated they had no particular place of business and that the address on the Form 11-C was the address of his personal residence, 2401 Ridge Avenue; he stated that during 1955 and up to June 30, 1956, North Sales Company had one agent, Charles Kastner, and that on July 1st, a new agent was employed
191 by the name of Malcolm Wagstaff. . . . The following day on December 14, 1956, I was again in the office of Waller Accounting Service, and at that time, Mr. Prindable, Mr. Donald Kastner, Mr. Waller and Mr. Mochel and myself were present. At that time there was a conversation between myself, Mr. Mochel and James Prindable, and the other people were present also during

Testimony of Wilbur Buescher

the course of the conversation. During the conversation, Mr. Prindable did most of the answering, and he and Kastner were questioned about their duties in the partnership. They were asked about their manner of accepting wagers, and we asked them about credit betting, and we asked them if they laid off to other books.

Mr. McKnelly: What was the reply to that?

They stated they did not. They stated they didn't even know any other bookies in town.

Mr. McKnelly: And he denied laying off bets to any other horse bookies?

He did.

193. **Cross-Examination, by Mr. O'Connell.**

Q. Mr. Buescher, after you had this interview or interviews, or during the time you conducted the interviews contemporaneously with the conducting of them, was any record made of the conversation?

A. Yes, notes were taken, yes, sir.

Q. Notes were taken?

A. Yes, sir.

Q. What did you then do with the notes?

A. We went over to the office of the Treasury Department and compiled a memorandum of the interview.

Q. And that memorandum was taken from the notes made at the time of the interview and embodied in a report, is that correct?

A. Into an office memorandum, yes, sir.

Q. Into an office memorandum or report as the statement of the transaction?

A. Yes, sir.

Mr. O'Connell: Your Honor, we would like to have
194 the Government produce the statement, report, and office memorandum of the witness, Wilbur Buescher. . . .

Testimony of Wilbur Buescher

Q. Mr. Buescher, this statement which was compiled from the notes you took, office memorandum, was that signed by you?

A. Yes, sir.

Q. And submitted to your superior?

A. It was put in Mr. Mochel's file.

Q. What did he do with it?

A. What he did with it, I don't know.

Q. He is a representative of the Government, is he not, sir.

A. Yes, sir.

Q. He is an agent?

A. Yes, sir.

Mr. O'Connell: I renew my request, Your Honor.

The Court: Did you take any longhand notes at the time the statement was made?

A. I did not, sir. I was sitting on Mr. Mochel's left at that time and he took the notes.

The Court: And what you later on wrote was written after you returned to your office?

A. Yes, sir.

195 The Court: You made a report to your superior?

A. That is right, sir.

The Court: The request is denied.

Q. The report you made, did you use the notes of Mr. Mochel?

A. That's right.

Q. You adopted those notes as yours for the purpose of making the memorandum?

A. I agreed with everything in them.

Q. And you did sign the statement or office memoranda?

A. Yes, sir.

Q. And that was submitted to an agent of the United States Government?

A. It was submitted to Mr. Mochel, yes sir . . .

My reason for going to the office of Press Waller was

Testimony of Wilbur Buesscher

that I had been requested by Mr. Mochel to go with
196 him and he had been assigned the wagering return
of the partnership, and I had audited the books and
records, I believe the day before, and Mr. Waller, I under-
stand, had arranged for Tom Clancy to be there.

Q. You keep referring to partnership, what is a partner-
ship, do you know?

Mr. McKnelly: We object to that. He is not a legal
expert, Your Honor.

Mr. O'Connell: Then he ought not to be using words he
doesn't understand.

Q. Do you say you know or didn't know what the pur-
pose of the interview was?

A. I was just requested to accompany Mr. Mochel.

Q. Do you or did you know what Mr. Mochel's pur-
197 pose of the interview was?

A. I did not, I was just there as a witness for the
Government, and I made no survey of the report of the
books of North Sales Company; I had nothing to do with
that. And at no time did I examine the books during this
period. I had previously audited the books, and guessing,
it would be two or three years prior to the interview, pos-
sibly in 1953. It was Mr. Mochel's assignment at that time
to audit the books, and that's what he was doing at
198 that time, and that was the purpose for the inter-
view. As I understand it, a layoff bet is when one
has accepted a wager, and he does not want to maintain it
or all of it, possibly due to his financial condition, or he
may be afraid the horse might come through, he will give
it to another bookie. I don't remember whether or not we
ever asked Mr. Clancy whether or not any one ever
199 laid off bets to him. The person who originally ac-
cepts the wager must pay the wagering tax on lay-
off bets. * * * After examining Government's Ex-
201 hibits, I cannot tell whether or not a stamp was
issued pursuant to that application. I would sup-

Testimony of Frank Hudak

pose the people in Springfield would know this. I
202 don't know who in the Government has any information on that, or would be able to tell us what the forms mean. I cannot tell you after looking at Government Exhibit 14 whether a stamp would have been
203 issued on this application; and, I don't know who could give us this information. As far as monthly wagering returns are concerned, once you apply for a federal stamp, you are placed on a mailing list and monthly you receive a return, and I am referring to Form 730. I cannot recall at any time during that interview as to
204 whether or not there was ever given to these men a definition of an agent as interpreted by the Government. We merely asked whether or not they had agents without any explanation as to just what an agent was. What my explanation of an agent is would depend on whether it was from a legal standpoint or from a layman's standpoint. For the purpose of the wagering tax, an agent is one who has been contracted by a partner in the business of wagering to accept wagers on their behalf. When we interviewed Mr. Prindable and Mr. Kastner, we did not explain to them what we meant by the term "agent". I cannot tell you what a registry number is as used in the special tax return and application for registry, since I have never studied anything about registry numbers.

Testimony of Frank Hudak.

FRANK HUDAK

210 was then called as a witness for the Government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Frank R. Hudak and I am employed by the Intelligence Division, United States Government Revenue

Testimony of Frank Hudak

Service, and I am a Supervisor of a group of special agents stationed at East St. Louis. I am familiar with the testimony regarding certain interviews had of the defendants, and certain records that were taken and seized from 211 2300a State Street, because I supervised the service of the search warrants and raid on the premises. I supervised the agents conducting the raid and the interviews conducted by the agents; and, the purpose for the raid and the interviews was that we had information leading us to believe there were violations of the Internal Revenue laws relating to wagering taxes in this place at the time.

Mr. O'Connell: I renew my objection to the statement on the ground the information would be only hearsay. If there is a person to whom that information is known, they should be brought to the stand.

The Court: Overruled.

In regard to the interviews and raid, the matters being investigated at that time was the Section of the Internal Revenue Code relating to excise tax, the 10% 212 tax on wagers, including horse race betting, and the section of the code that levies a \$50.00 special tax on all persons engaged in accepting wagers. On July 23, 1957, I was in the Federal Building here in one of the offices of the United States Attorney, or his assistant, Mr. Maag, along with the defendant, Donald Kastner, Mr. O'Connell, Norman Mueller, Mr. Raemer and myself were present, 213 and a conversation was had between these persons and Donald Kastner. The substance of the conversation was that Mr. Kastner stated at that time that he had been engaged in the horse racing handbook business with Mr. Tom Clancy and James Prindable, doing business as the North Sales Company, and that they had operated—

Mr. O'Connell: We object to this statement and move for a dismissal or judgment for the defendants, since it

Testimony of Frank Hudak

could only be binding, if at all, against Donald Kastner, and not the other two defendants, Prindable and Clancy; and, if admitted at all, it should be admitted only as to Donald Kastner.

The Court: Overruled. Proceed.

He stated he and these two gentlemen had conducted a horse racing wagering business in the premises located at 2300a State Street, and that they had as an employee of North Sales Company, Mr. Charles Kastner who was stationed at the place in East St. Louis, and who received horse race bets over the phone. Donald Kastner also stated he took bets in that manner at 2300a State Street.

Mr. O'Connell: For the record, may I move the objection I have previously made apply to all this narration?

The Court: Let the record so show. The same ruling. . . .

Cross-Examination, by Mr. O'Connell.

218 Mr. Kastner did not say that he didn't know anything about the records. He said he didn't know a great deal about the records. Mr. Kastner did say he
219 didn't know what these sheets represented. I am a lawyer and I know what a partnership is. He stated
220 he was a partner, but he also stated he didn't have a great deal to do with the management of the business.

Q. He said he had no voice in the business, didn't he, Frank?

A. No, sir, he didn't.

Q. He didn't say that?

A. No, sir.

Mr. O'Connell: We request now the statement or memorandum taken by Mr. Hudak, and his notes be submitted to us for examination, Your Honor.

Testimony of Frank Hudak

The Court: The motion is granted.

221 My notes show that Mr. Kastner stated that he knew he was reported as a partner on the Form, but doubted that he had full rights of a partner. He stated that Mr. Clancy had guaranteed him \$80.00 a week, but he got about \$100.00. He stated that Mr. Clancy had the greatest voice in the management. I would not state that he said that in his opinion he was just a clerk in those words, but he did say he doubted he had the full rights of a partner in the partnership. I did not go on the 222 raid, but I had charge of the agents who prepared the search warrants and executed them, and they delivered the seized records to my custody. The receipts and the return of the warrants were given to me and I am familiar with them. Donald Kastner's signature does appear on the receipt, and he designated himself as clerk.

Q. Isn't it true, Mr. Hudak, in your knowledge of 223 law, in order to be a partner you have to have an equal voice in the management and control of the operation of the business?

Mr. McKnelly: We object to that.

The Court: Sustained.

224 Q. What is a layoff bet?

A. It is a bet passed on by one bookie to another.

Q. He holds some of it and passed on the rest?

A. He may hold some, and the rest of it he may pass off or he may pass all of it off, sir.

Q. In the layoff bet he is responsible for—the man 225 that passed the bet he is responsible for the portion that he keeps, is that right?

A. As far as taxes, not as far as the risk is concerned.

Q. Aside from the risk, he keeps what he gets?

A. He is obligated to pay the full bet, but, in turn, he can collect from the person he lays the bet off to. He can recover part of the loss if he loses. . . .

Testimony of Frank Hudak

Q. The person who makes the layoff bet, or accepts it, is responsible for the payment of the tax?

Mr. McKnelly: We object to that as calling for a legal conclusion, and asking for an interpretation of the law.

The Court: He may answer if he knows.

A. The person by accepting the bet in the first place is liable for the tax unless he shows on the return he layed it off.

Q. He must show on his return he laid it off?

A. Yes, sir.

226 Q. And if he doesn't show that he is liable for the tax, isn't that correct?

A. That's my understanding, yes, sir. * * *

Redirect Examination, by Mr. McKnelly.

227 " Mr. Kastner told me there were general arrangements with the partners and the agents. Under one arrangement they were entitled to 40% of the profits from these bets, or liable for 40% of the loss. On the other bets the bets were designated as 5% bets and the agents of the North Sales Company got 5% of the gross amounts of the bets.

228 Mr. O'Connell: We move that the testimony be stricken or that it be restricted to the defendant, Donald Kastner, and the jury instructed that it cannot be considered in the determination of the case against Prindable and Clancy.

The Court: Overruled.

Testimony of Norman J. Mueller

Testimony of Norman J. Mueller:

229

NORMAN J. MUELLER

was then called as a witness for the Government and, being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Norman J. Mueller and I am employed as a special agent of the Intelligence Division of the Internal Revenue Service at East St. Louis, Illinois. On July 23, 1957, I was present in the United States Attorney's
230 office with Mr. O'Connell, Mr. Hudak, Mr. Raemer and Maag, at which time an interview was conducted of Donald Kastner; the substance of the conversation was that he was a partner in the North Sales Company with Mr. Prindable and Mr. Clancy; that they would meet each morning above Zittel's Tavern, at which time they prepared a summary sheet, which the Government introduced as Government's Exhibits 79 to 109, a daily summary sheet. He denied the statement he made to federal agents on May 6, 1957, and——

Mr. O'Connell: We object to that and move the testimony of Mr. Kastner be restricted to Mr. Kastner and not to be used in any way against the defendants, Clancy and Prindable, and that the jury be instructed to restrict it for that purpose.

The Court: Overruled. . . .

In connection with the records he said that these Exhibits 79 to 109 were the summary sheets on the betting, and that he would meet with the other partners each morning above Zittel's Tavern in connection with the
231 preparation of these records; and, also, that the partnership was operating from those premises at the time he joined the partnership; that Unk Behnen had been

Testimony of Norman J. Mueller

an agent and that Otto Pohlman was an agent, and that in these hedge bets Pohlman received 5% of all straight bets. Government's Exhibits 30 through 53 are the records seized by Special Agent Kienzler from the premises, and Mr. Hudak turned these records over to me and I picked them up in the vault at the Internal Revenue Office.

232 Mr. McKnelly: We offer in evidence Government's Exhibits 30 through 53, Your Honor.

Mr. O'Connell: We object to the admission of these Exhibits into evidence. They are the same Exhibits Kienzler said he got from out there.

The Court: Overruled. Government's Exhibits 30 through 53, inclusive, will be admitted.

Mr. O'Connell: May we also, for the record, object to the admission of the Exhibits on the basis there has been no connection whatever of the defendants in this case, and it is apparent from the evidence heretofore offered that the apartment was occupied and owned by Mr. Henry Zittel, and the records were taken from his premises.

The Court: You may have your objection. The objection is overruled.

Cross-Examination, by Mr. O'Connell.

233 I made notes of the interview independent of Mr.

Hudak's notes. (The court then granted permission to examine the notes.) The notes state that Clancy hired Prindable to go to work and the arrangement was for not less than \$80.00 a week, and he averaged about \$100.00 a week, and he received at least \$80.00 per week since he started something a little more than three years ago. He also stated that Clancy had the returns prepared by

234 Mr. Waller and then gave them to him to sign. I believe he stated that he was not sure if he ever saw Form 11-C, Application for Registration. If I had my notes I could testify, and I am not sure how it is worded as to

Testimony of Norman J. Mueller

whether he had no voice at all in the operation of the business. He stated that he did not invest any money in the business, did not share in the loss, did not have to share in any loss. As I remember it, he stated that Tom paid salaries to "P," Charles and himself; the way Mr. Kastner explained it, a hedge bet was a bet in which agents
235 of the North Sales Company did not want to participate in the profits. It was in the nature of a layoff bet; that a hedge bet was in the nature of a layoff bet where an agent shared 5% commission, rather than 50% or 40%. When a bet is placed with one man and he turned the whole bet over to another man, that is a layoff bet, and on such a bet as that the initial acceptor is liable for the tax provided he didn't keep a record of it.

Redirect Examination, by Mr. McKnelly.

236 Q. Did Mr. Kastner explain about the way taxes were paid while he had worked there?

A. Yes, sir, he did. He said they were paid so far as he knew.

Q. Did he say how the agents were paid off for their work there?

A. Yes, sir.

Q. What did he say about that?

A. He said every morning they paid off the agents.

Mr. O'Connell: We object to that. I believe it is repetitious.

The Court: Proceed.

Mr. Kastner stated the agents would have two types of bets, the bets on which they shared in the profits of the bets and the bets which they didn't wish to take a chance on. Therefore, they were paid 5% of the gross wagers. On the regular they participated in the profit to the extent it was a profit or loss, he stated either on the basis of 40% or 50%, depending on the agent. * * *

Testimony of Merlin A. Behnen

Testimony of Merlin A. Behnen.

MERLIN A. BEHNEN

237 was then called as a witness for the Government
and, being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Merlin A. Behnen and I live at 715 North
40th Street, East St. Louis, Illinois. I operate a
238 tavern located at 512 North 27th Street, East St.
Louis. I know Donald Kastner. He used to be a
neighbor of mine. I accepted wagers on horse racing in
my tavern in 1956 and 1957. When I first began ac-
239 cepting wagers I called them in to Mr. Kastner. The
bets were made by customers who came in my
tavern.

Q. How did you first know to call Kastner and place
your bets?

A. Well, things like that get around. You hear about it,
so I got hold of Mr. Kastner and asked him if we could call
in some bets to the office.

Q. What did he tell you?

A. He said sure.

He told me how to go about it. I would then take the
bets and call them in over the phone. I generally
240 talked to Mr. Kastner, but sometimes there were
other voices on the phone. I received a payment of
5% on the dollar for receiving bets at my bar. After I
collected the money, and called in the bet, the next day
there would be a messenger come up and she would bring
the results of the races, and I gave the money to
241 her. The messenger also delivered the results of the
races, scratch sheet and form, and I generally re-
ceived my 5% at the beginning of the new month.

Testimony of Merlin A. Behnen

Cross-Examination, by Mr. O'Connell.

I was arrested during these raids for taking and accepting wagers without a federal gambling stamp, and I didn't have a stamp. I was operating a bookie at the time without a stamp.

Mr. McKnelly: We object to that. That's not what the witness testified to.

The Court: Sustained.

I accepted the bets and I paid the betters myself, . . .

Q. In this business you have been discussing your running of a bookie? Have you ever laid off bets to anybody other than Mr. Kastner?

A. No, I didn't.

Mr. O'Connell: At this time I move the testimony of Mr. Behnen be restricted to the defendant, Donald Kastner, and not be considered by the jury as against the other two defendants, and we move the court to so instruct the jury.

The Court: Overruled. Motion denied.

Redirect Examination, by Mr. McKnelly.

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Recross-Examination, by Mr. O'Connell.

Q. Are you familiar with the term, "lay off" bet?

A. I imagine you mean calling them in to someone.

245 Q. When you laid off a bet, where did you expect to get money if there was a loss?

A. From the people you call it in to.

Q. The people you laid it off to?

A. Yes, sir, that's right.

Testimony of Harry Bierman

Testimony of Harry Bierman.

HARRY BIERMAN

was then called as a witness for the Government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Harry Bierman and I live at 401 North 24th Street, East St. Louis, Illinois, and I operate a tavern; I have accepted wagers on horse races in my tavern in the year 1957. * * *

247 Q. What did Mr. Prindable tell you about accepting these bets?

A. He said take the bets and we would split 60/40 on the bets.

I took the bets from my customers, mostly, and I put them in a cigar box and the next day someone came around and collected them. I called in my bets over the tele-

248 phone after I took them, and I was paid 40% of the net profit once a month. If I needed the money,

Prindable brought it the next day, and if I had enough money in the cigar box, I paid it out of there. * * *

Cross-Examination, by Mr. O'Connell.

249 On the bets I made I would share 40% of the profit and be responsible for 40% of the loss. I paid the bettor and ran an independent business. They never

250 exercised any control over me at all, and I had an independent judgment of the bets I would accept and the bets I would not accept. I exercised this independent judgment, and what I did was lay off 60% of the bet.

Testimony of Leo Klimas

Testimony of Leo Klimas.

LEO KLIMAS

was then called as a witness for the Government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

251 My name is Leo Klimas and I live at 5506 Casey-
ville Avenue, East St. Louis, Illinois. I own a tavern
which is also located at that address. I accepted
wagers on horse races in my tavern starting in the latter
part of 1956 and the first part of 1957. I know James
Prindable and Tom Clancy. The way I got into this
252 business was that I was approached by one of the
boys, Mr. Prindable.

Q. What did he say?

A. He just wanted any business we could get.

He said I would get 40% of the earnings at the end of
the month. I then took bets from my customers, and after
I took them I phoned them in by telephone. Sometimes I
spoke to Jim and also to Tom Clancy, and sometimes
253 to Donald Kastner. After calling in my bets, the
next morning a messenger came by and left me some
forms, some form sheets and scratch sheets, and picked
up the money and the bets. The money owing to my cus-
tomers she brought with her the same morning. She is
Mrs. Charles Kastner.

Q. Did you ever have any conversation with James
Prindable in relation to the owners or operators of the
business he was in?

Mr. O'Connell: We object to that. Object to any con-
versation with Mr. Prindable on the ground that any con-
versation he may have had with him would not be bind-
ing upon the other two defendants, Your Honor.

Testimony of John Kukorola

The Court: Overruled.

254 Well, the only thing I can recall is that him and Tom Clancy were in business together.

Cross-Examination, by Mr. O'Connell.

Q. What you can recall is they were in business together?

A. Yes, sir.

Q. He did restrict it to Tom Clancy?

A. He sure did.

I am presently under arrest by the Federal Government and my case is pending in this court. The way this situation worked was that I got 40% of the profit and I was to share in 40% of the losses.

256 I accepted the bets from the bettors and I paid them off, and I did not have a stamp; and I never filed any form or papers with the Government. * * * Mr. Clancy or none of the partners ever exercised any control or dominion over me, or gave me any instructions as to who could bet with me or who couldn't; I was on
257 my own and all I was concerned with was the end result; I never had a bet rejected by the North Sales Company; if they were too large, I wouldn't accept them; that was up to me and my judgment. * * *

Testimony of John Kukorola.

JOHN KUKOROLA

258 was then called as a witness for the Government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McNelly.

259 My name is John Kukorola and I live at 4978 Missouri Avenue, East St. Louis; I tend bar and was tending bar in 1956 at the Village Tavern, and I took

Testimony of John Kukorola

horse race bets in that tavern in the last part of 1956 and 1957; I got in the business since I had done a little betting myself and I started taking a few bets; I don't remember how I arranged it right off hand; I didn't take any bets of my own, I was calling them in.

Q. How did you know where to call them in?

A. Well a couple of different fellows told me where to make bets.

Mr. O'Connell: We object to that, what any particular fellows told him unless they are defendants.

The Court: Sustained.

I know James Prindable and I had a relationship with him in relation to horse race bets; That's where I was making the bets; the way I handled my bets was to call them in; I made 40% of the profits for taking bets and after I called in the bets, if they won I would give them the money which Prindable would bring out.

Cross-Examination, by Mr. O'Connell.

I got 40% of the profit and stood 40% of the loss if there was any; during this period of betting, I laid off the bets to different ones, whoever wanted to make a bet; I didn't work with other people, except Prindable; I didn't take nobody else; didn't bet with nobody else but with Prindable; and I never at any time, laid off bets with any other bookie; I am presently under arrest and my case has not yet been disposed of; Prindable never tried to control me in the manner in which I operated my business, or in the manner in which I took bets; or, who I should or shouldn't take bets from; that was left up to me; all they looked to me for was the end result; I laid off the bets to them and they paid off.

Testimony of Lawrence Buklad

Testimony of Lawrence Buklad.

LAWRENCE BUKLAD

was then called as a witness for the Government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Lawrence Buklad and I live at 1128 North 9th Street, East St. Louis; I own and operate a tavern located at 1123 State Street and have been in the tavern business four years; I accepted bets on horse races in the tavern beginning the latter part of 1956; the way I began accepting wagers on horse races was that a couple of my customers wanted to bet on the horses; I did not keep the bets myself; I turned them over to a party who came by and picked up the bets every morning;

I knew to do this since I called James Prindable; he made arrangements to take the bets and I turned it over to him after the bets were taken from the customers; if a fellow came in and bet \$10.00 on a horse, I put it behind the counter on the backbar; for this, I received 40% of the profit; I got the money to pay off the bettor from the messenger that picked up the money that was bet.

Cross-Examination, by Mr. O'Connell.

A bettor would come in my place and bet on a horse and I would get 40% of the profit at the end of the month; whatever profit there was; and I was responsible for 40% of the loss; I accepted the bets from the bettor; paid off the bettor; and never operated with a wagering stamp; I am presently under arrest and have a matter pending in this court; Prindable at no time ever bossed or dom-

Testimony of Henry D. Zittel

inated or controlled me in the management of my
271 business, or in the manner in which I would accept
bets; he exercised no direction over me in the taking
of bets; I was looking for somewhere to lay off these bets
and he took them. * * *

272 Testimony of **EUGENE BURNS.**

(Not abstracted since it is not pertinent to the issues
raised by the defendants-appellants in this cause.)

275 Testimony of **DARREL H. MANNING.**

(Not abstracted since it is not pertinent to the issues
raised by the defendants-appellants in this cause.)

278 Testimony of **VERNON LAMPE.**

(Not abstracted since it is not pertinent to the issues
raised by the defendants-appellants in this cause.)

Testimony of Henry D. Zittel.

284 **HENRY D. ZITTEL**

was then called as a witness for the Government, and
being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Henry D. Zittel and I live at 3906 Linden
Place, East St. Louis, Illinois; I operate a tavern at 2300
State Street, East St. Louis, in a two story, four family
building; from January 1, 1956, to July 9, 1957, my father
lived upstairs above the tavern. We found him dead in
bed there; on July 9, 1957, he occupied the whole
285 premises or whole apartment up there; * * * I know
the defendants, James Prindable, Thomas Clancy

Testimony of Henry D. Zittel

and Donald Kastner, and I have seen them upstairs; I don't know how many times I saw them there, since
286 they were in and out; I would go upstairs to see my father, and I also had my records stored upstairs; sometimes these fellows would be up there; I accepted wagers in my tavern from anybody who offered them; they would come in and say "give them to Tom", or something like that; they would generally be in an envelope marked, "Tom"; I had a safe and that belonged to me and I would put them in the safe; I don't positively remember who gave the envelopes to me, but sometimes people would
287 come in and give them to me; sometimes somebody came in and I have had stacks of them; Mrs. Gladys Kastner gave me the stacks of them; I personally received nothing in return for accepting wagers; I did it as a favor; they used to leave money upstairs and I used it to cash checks on Friday, but we always replaced it; Mr. Clancy left the money upstairs and it varied according to paydays; maybe a thousand or fifteen hundred dollars when we had the railroad paydays; John Leppe did
288 not live up above my tavern; I never knew him; the address upstairs over the tavern is 2300a State Street; I think I saw Government's Exhibits 38, 37, 36, 33, and so forth, and 30 in my premises; I think I saw the name on the envelopes, but never opened it; I laid them in the safe in the building which I used and no one else; there was nothing in it only these books and records and some money bags there; I don't know who took them out of the safe; sometimes they would still be there in the morning after I put them there in the evening; I never went around the tavern until 11:00; I spent just enough time upstairs above the tavern to see my father; I would go up and visit him now and then, and of course, I
289 would go up and run the checks up on Friday evening; there was one telephone upstairs; during

Testimony of Henry D. Zittel

1956 and 1957, I had a bank account at the Southern Illinois National Bank and I took cash and checks from the people in my tavern, but did not deposit them to my account; I cashed them in the bank; someone other than myself cashed checks at the bank, the checks taken in upstairs and my checks that had my stamp on them.

Q. The ones taken upstairs were cashed with your stamp?

A. The ones I cashed, I brought my part of the money
290 back and used it for cashing checks again with my stamp.

Q. What about their checks, you had nothing to do with them?

A. I don't think they had my stamp on them. They could have had. They might have used my stamp on them before I got there in the morning. Mr. Clancy also used my account to cash checks. He used to take the checks to the bank that I didn't get, payroll checks. I didn't get there until 11:00 in the morning. They probably wanted to cash those before that so they would have the money.

I know there was a telephone upstairs, but I don't remember the number; Bridge 1-0680 sounds familiar; when

I got a wager in my tavern, I generally didn't pay
291 much attention to it unless there was a pretty good stack of money with it; if I got one bet, I threw it back there and hollered upstairs and told them they had so much on a horse; I didn't pay too much attention to it; generally, Mr. Kastner was up there; generally, in the morning, Mr. Kastner and Mr. Clancy were in the premises upstairs above my tavern, and at times Mr. Prindable was up there, but I wasn't in the room; these
persons met above my tavern just about every morn-

292 ing; by these persons, I mean Mr. Clancy, Mr. Prindable and Mr. Kastner; I didn't ever observe any checks that were cashed using my stamp, that I didn't

Testimony of Henry D. Zittel

take in or cash at the bar; I never paid any attention to it; I added up the totals of the ones I cashed and that's all I paid attention to. * * * I have been above my tavern when bets were taken on the telephone; I have seen them written down; I didn't hear them; Mr. Kastner wrote them and I also saw Mr. Clancy too; I took over the tavern on January 1, 1954, and they were using the premises then, in and out of there; I remember one instance when there wasn't a telephone up there, but I don't know how long that was; I got the cash that I used to cash checks in a buffet upstairs, and Mr. Clancy told me I could use it; I didn't get it from the buffet myself, sometimes in the morning they would bring it down on Friday, the largest amount of cash I ever used was approximately \$2,000; I don't know exactly.

Cross-Examination, by Mr. O'Connell.

My father was up there all the time also; he lived there, and in 1957, he was 82 years old; he was a fairly, good active man until February of that year; in 1956, my father just put in time with me; I paid my father \$40.00 a week just to oversee the whiskey upstairs and stuff like that, and he was on Social Security; I don't think my father at any time in his life ever operated a bookie; poker game, yes, but not a bookie; we used to live at 2208 State Street and used to take bets there; that was in the twenty's but I don't think he ever operated a bookie though; I presently have a case pending in this court for not having a stamp.

Q. Were you operating a bookie at that time?

296 A. I was accepting or taking bets. * * * I received no compensation at all, and I was under no direction or control of either Clancy, Prindable or Kastner; I took them as a favor and they paid my father's rent is the rea-

Testimony of Charles Kastner, Jr.

son I did it; I don't know who paid the telephone bills or if they were paid; it may have been my father's telephone but I don't know why he would use the name Leppe. • • •

Testimony of Charles Kastner, Jr.

CHARLES KASTNER, JR.,

298 was then called as a witness for the Government,
and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Charles Kastner, Jr., and I reside at 1112 Summit, East St. Louis, Illinois; during the period of approximately July of 1954 until May of 1957, I was employed by the North Sales Company at 1515 North 48th Street, and I worked at a place on Collinsville Avenue; my duties were taking bets on the telephone; the place on 48th Street was Mr. Lampe's; the place on Collinsville Avenue was above the Drummond's Furniture Store, but I don't know the number; I was employed by Mr. Clancy and I was paid a regular salary; for about two months I got \$80.00 a week, and later on I was
300 getting \$60.00 a week; other than taking bets over the telephone, I also delivered form sheets and scratch sheets to the different customers; I got the form sheets at Pohlman's News Service on 5th Street; I also delivered envelopes which were sealed; the envelopes contained yellow sheets with bets on them and they were given to the customers; what he did with them, I don't know; they never returned them to me; I delivered them to various places and persons; when I left Pohlman's,
301 the first stop was at the stockyards; I drove my car; and I left some scratch sheets and some form sheets at Cupples; I never left them with any particular

Testimony of Charles Kastner, Jr.

person. * * * From there I would go to 9th and
302 Exchange to a place by the name of Clem's Tavern;
from there I would go to 13th and St. Clair Avenue
in the confectionery there and leave a scratch sheet and
form sheet, and one next door, and then I went out St.
Clair Avenue East from 13th Street in the next block and
left a scratch and form sheet there; from there, I went
to 13th and Lake to Dizzy Dean's; left a scratch and form
sheet there; and then I would go to Leo Klimas' and left
him two scratch and two form sheets, and left an envelope
there; from there, I went to several other places; I got
the envelopes from the office after they had met in the
303 tavern the day before; I don't know exactly where
I went then; I stopped at 18th and Missouri at a
confectionery and stopped at Kukorola's about 4800 Mis-
souri Avenue, I think, but it couldn't have been over 30
days; from July 1st to May 6th or 7th I stopped at the
Key Club, and I really don't remember all of them; I
also stopped at Booklan's at 12th and State and Benio
Banolen, and at Henry Bierman's, and also Zittel's and
Hopp's Tavern; at these places, I left scratch and form
sheets; then if I had time I got something to eat;
304 if I didn't have, then I would go to work at the
place above Drummond's and at Lampe's house on
48th Street; I left the place up above Zittel's at 9:00 in
the morning, and before that time I had to do all that
clerical work with those yellow sheets; referring to
305 Government's Exhibits 79 through 109, these sheets
and different customers were all sorted out and each
customer put together; they were yellow sheets similar
to that and white sheets just one-half the width of that
(referring to Government's Exhibit 111 and a portion of
it). The long, yellow sheet would be entirely completed
so far as the wagers were concerned; these were the
wagers that were called in and I worked on these sheets;

Testimony of Charles Kastner, Jr.

Ed Jenks called in this wager for instance; I know that by the name on there; that looks like Mr. Clancy's handwriting.

306 Mr. O'Connell: We object to that.

A. I would say Mr. Clancy.

The Court: The answer may stand last given.

I have seen Mr. Clancy write quite a bit. * * * This
307 one is Hopp's; this one is Harry Bierman's; this one is Dizzy Dean's; this is my handwriting; that's Kukorola's with my handwriting; that one is Mr. Clancy's; these bets were not taken by me; they were received on the telephone; I took them down whenever I was
308 taking bets; that is why some of them are not my own handwriting (referring to a portion of Government's Exhibit 111). In the morning before 9:00, when we met above the tavern, I would have to get the sheets together and figure the winners and losers; by that time, Mr. Clancy or one of the others would be there; I would then give the tickets to them; examining Government's Exhibits 54 through 109, I recognize some of the handwriting; that is my brother's and that is Mr. Clancy's; the top one-half of Government's Exhibit 107 is my brother's
handwriting, and the bottom one-half is Mr. Clancy's;
309 the rest of it was made by Mr. Clancy; these three things are made by my brother on Government's Exhibit 71; Exhibit 94 was by Donald Kastner, as well as 97 and 96; the name appearing in the left hand
310 column is the customer's name; that is the person who called in the bets; the information that is present on these yellow sheets was obtained from a recap of the yellow sheets you showed me.

Q. The figures on Government's Exhibits 54 through 109 were taken from portions of 111?

A. Similar to that; similar sheets to that.

Q. In addition to that, there is another portion of Government's Exhibit 111 of little white sheets of paper?

Testimony of Charles Kastner, Jr.

A. Yes, sir.

Q. What are they?

A. Wagers. . . .

311 To the best of my knowledge, Harry Wagstaff
worked for North Sales Company, and the North
Sales Company took bets from Otto Pohlman; he called in
bets and gave them to me and I usually got his bets on
the telephone; before 9:00, before I started on my route,
when I was up above Zittel's Tavern, there was very
312 seldom anybody there; then my brother and Prind-
able and Clancy usually came in between 8:30 and
9:30; then I obtained the envelopes which I delivered to
various people on my route from Mr. Clancy who made
them out, such as the sheet marked Government's Exhibit
111; they would be put in an envelope, sealed, and he
would give it to me and that sheet; when I first started
on this job, if I remember correctly, I was given a
313 list of places; this was given to me by Mr. Clancy.
. . . I never prepared any documents similar to
314 Government's Exhibits 54 through 109; I could
have made out part of them; none of the defendants
ever told me what these sheets mean, but every morning
I was sitting across the table from them; I saw the little,
yellow sheet showing on that tabulation on the tab and
what was on the sheet there; Mr. Clancy did it 99% of
the time; Government's Exhibit 100 has various names on
it; some of them I can identify and some I can't;
315 these are the same names I used on the yellow sheets
when I took bets; I recognize the handwriting on
Government's Exhibit 121; it is my brother's, Donald
Kastner; the list that appears on the sheet is wagers, bets;
from the details on that sheet I can tell from where those
wagers were obtained; "O. P." was the name used
316 for bets received from me; the handwriting on
Government's Exhibits 122 to 144 is my brother's

Testimony of Charles Kastner, Jr.

318 and mine, either on the front or the back; by recap,
I mean the total amount placed and minus the
amount paid, which would give you either a win or
319 loss figure; the letter "T" stands for take or profit;
321 it means the total amount played; referring to Gov-
ernment's Exhibit 111, carbon copies are on the
inside, and the original was given to the customer.

Q. The carbon of the original of the customer's original
was kept in the file?

322 Mr. O'Connell: We object to that.

Mr. McKnelly: I am merely trying to identify the
cover, Your Honor.

Mr. O'Connell: He is trying to testify from the con-
tents before they are identified.

The Court: Proceed and we will see. . . .

Q. Mr. Kastner, I hand you an instrument marked Gov-
ernment's Exhibits 111-A to 111-RRR. Do you recognize
the writing on that 111-A?

323 A. That is my brother's on the recap, Mr. Clancy's
and mine on the sheets.

That's my writing on the sheets of 111-B; that's my
brother's there on 111-C and Mr. Clancy's on the sheets; on
111-D, my brother's writing on the recap, Mr. Clancy's on
the sheets; on 111-E, that's my brother's writing on the
recap and Mr. Clancy's and mine on the sheets; on 111-F
my writing on the recap and my brother's on the sheets;
on 111-G my brother's writing on the recap, and my
brother's and mine on the sheets; the yellow sheets are a
list of the wagers accepted by North Sales Company.

324 Mr. O'Connell: This has not been identified, Your
Honor.

The Court: He may answer.

These are wager sheets, wagers accepted by North Sales
Company; it is Mr. Clancy's writing and this is my writing
on the sheet; I have never accepted wagers for anyone

5

Testimony of Charles Kastner, Jr.

other than North Sales Company in the last six or seven years; I have worked for or with Mr. Clancy other than at North Sales Company; I worked with Mr. Clancy from about '34 to '44, but we did not use this exact same type of sheet then; I have used them elsewhere, but not
325 with Mr. Clancy at North Sales Company; the nine yellow sheets marked 111-F, E, H, S, I, J, K, L, M, N, O, P, Q, RRR, 111-A, 111-B, C, D are the type of sheets I have just discussed.

Q. Did North Sales Company sell these little 3 x 5 sheets on which you were to record bets?

A. That's the sheet used there at the North Sales Company, that size we used there, these small ones but some of these sizes we did not use.

326 I don't recognize the handwriting on Government's Exhibit 111-KKK. That's my handwriting on Ex-

327 hibits LLL, MMM, NNN, WW, RR, QQ, PP, LL, II, HH, GG, YY, ZZ, AAA, BBB; that's my brother's handwriting on OOO, QQQ, VV, UU, TT, SS, KK,

328 FF, EE, DD, BB, and AA; that's Mr. Clancy's handwriting on OO, NN, MM, CC, CCC and EEE; I don't know whose handwriting is on III, FFF, and GGG.

329 Mr. McKnelly: We offer in evidence your Honor, Government's Exhibits XX, triple E, triple B, triple Y, triple A, triple Z, double E, triple G, H, Y, J, KK, LL, MM, triple NN, OO, PP, WW, triple Q, triple N, L, 111 B, C, D, A, triple R, P, O, N, M, L, K, J, I, G, H, E.

Mr. O'Connell: We object to the admission of the exhibits on the ground they are entirely immaterial and irrelevant. There has not been established yet any time for the making of these exhibits and the only time set forth in the indictment that is material is 1957 and there has been no testimony whatsoever as to the time.

Mr. McKnelly: Then counsel should read off the ones I

Testimony of George Kienzler

failed to read, if any of them, and state the ones he objects to, your Honor.

Mr. O'Connell: I'll be glad to, your Honor.

The Court: Will you step up a minute, gentlemen?

(Conference at the bench between Court and counsel.)

Mr. McKnelly: Mr. Kastner, will you step down a minute and wait to be recalled?

The Court: The objection is overruled. The exhibits will be admitted.

Mr. O'Connell: I would like to ask that they be restricted for the purpose of proving count 5 and not as to any other count in the indictment.

The Court: Overruled. They will be admitted generally.

Testimony of George Kienzler.

GEORGE KIENZLER

330 was then recalled as a witness for the Government,
and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is George Kienzler and I am the same person who testified in this hearing previously; concerning the raid at 2300a State Street, I was in charge of the raid and served the search warrant on the premises; when I left the premises at 2300a State Street and returned to the Internal Revenue Office here in East St. Louis, I
331 took the packages that we had seized and which were listed on the receipt, and which has previously been offered here, and when I got back to the office I re-examined a lot of the packages and some of the papers so that I could see what I had, and then we reassembled them in packages which we marked and sealed, and the packages were originally identified as marked on the re-

Testimony of Press Waller

or as I understand, one of the others brought them in my absence sometimes; I have never seen Government's
363 Exhibits 54 through 109 before, nor have I ever seen Government's Exhibit 110; I maintained records for the North Sales Company during the years 1956 and 1957; his attorney may have gotten the records; Clancy got them and gave them to his attorney.

Cross-Examination, by Mr. Waller.

364 Government's Exhibits 19, 24 and 29 were prepared by me or under my supervision in the office, but I did not mark that letter identifying these exhibits there that they were prepared by me; Exhibits 1 through 9 are the monthly wagering tax returns for North Sales Company and the number 37-2369-P that appears on all of them and on the other special tax statements is the registration number that is assigned when they make their application for the special tax stamp, and it appears on
365 Form 730; these represent payments made by the defendants to the Government and the number 37-2369-P appears on each of them; Government's Exhibits 11 to 14 are in the same condition now as they were when they were filed with the exception of the business "at large"; it is ruled out in one instance; the notation \$50.00 on number 11 was not there, or the number 4-312; the item "journalized July 14, 1953" was not there, nor was the number 37-2369-P.

Q. The reference you made to the "at large" and the address of the defendants, business address, was that drawn through at the time you filed this return?

366 A. No, sir. On Government's Exhibit 12, the number 37-2369-P is the registration number, the same number appears on the stamps of the defendants;
367 Defendants' Exhibit 2 is a special wagering tax stamp and it was issued to the North Sales Com-

Testimony of Press Waller

pany; concerning Government's Exhibits 19, 24 and 29, I didn't prepare these; I was mistaken; I didn't notice the 57's were in there; I didn't prepare these.

Q. I now hand you Government's Exhibit 12 and direct your attention to Question 2 where it says business and the answer "at large" with a pencil marked through it.

368 T. Tell the Court and jury whether or not the pencil mark was through it at the time it was filed by you?

A. No, sir.

Q. What does that "at large" mean?

A. They can do business anywhere.

Q. That was the purpose for inserting that?

A. Yes, sir.

Q. Directing your attention to Government's Exhibit 13, where the inquiry concerning the business and the words "at large" appear with a pencil mark through, I will ask you whether or not this "at large" was crossed out at the time you filed this return?

A. It was not.

Q. I now hand you Government's Exhibit 14 and direct your attention to the same question where it says the word business and the answer "at large", tell the court and jury whether the pencil mark was through the words "at large" at the time this return was filed by you?

A. It was not.

Q. Will you state whether the special tax returns and application for registry of gambling, Government's Exhibits 11 through 14, were ever returned to you for correction?

A. No.

Q. They were not?

A. They were not.

369 Q. Directing your attention to the same exhibits, does the number 37-2369-P being indicated as the registration number for the North Sales Company appear on each of those returns?

Testimony of George Kienzler

ceipt; but some of them were corrolated into larger packages.

Q. These packages, for example, Government's Exhibit 111 was never sealed and you were in possession of and in control of these packages of this nature that are in evidence here?

A. At the time of the raid and after, yes, sir, until they were delivered to Mr. Hudak at the Internal Revenue Office.

We opened some of the packages to see what was contained in them, but we put them back in their original form.

Q. Each package appears to be in the original form which you left them in when they were delivered to Mr. Hudak?

A. They ought to be.

The Court: The question is, are they?

I did not take anything out or add anything to them, and I gave them to Mr. Hudak.

332 **Cross-Examination, by Mr. O'Connell.**

I opened some of the packages and I was assisted by Mr. Minton, Mr. Struhuan and Mr. Walsh in the Internal Revenue Office in East St. Louis, I believe Mr. Hudak was there; he was in the building and out some of the time while we were examining these records; he was in and out of the room; we took these packages apart, some of them, to see the nature of the papers inside them.

Q. After you examined the papers, you were—were you able to identify them, do you know what they are and what they purport to show?

333 A. I have no definiteness of it, no.

Q. You have no knowledge of it, do you?

A. Only they are papers we saw with writing on them.

Testimony of George Kienzler

Q. But you don't know what they purport to show at all, do you?

A. I think I would recognize them.

Q. You would recognize them as papers with writing on them, is that correct?

A. Yes, and the writing is the record of wagers.

Q. You don't know that, do you?

A. The writing on the—

Q. You have heard that but you don't know that of your own knowledge, do you?

A. The notations on those documents are the writing in the corner, wagers is what is usually written . . .

334 I can't show you where Government's Exhibit 111 is found on this receipt; however, I made some supplemental notes during the time I was examining the documents after I returned to the office and I perhaps could tie a particular package to an item on there with the aid of those notes; the receipt covers everything that was taken but you will note there is some general language included on the receipt; there was quite a volume of papers taken out there that day.

Q. But there is no way you can identify these on this receipt as having been seized in the raid?

A. I can't positively identify item six but it indicates that carton or box had 147 racing forms, I believe it is.

Q. What time in April was this?

A. It don't indicate here on the receipt; however, there was another item, four paper sacks containing 9 racing forms have since been obtained and are probably all in the box now.

Q. But it is not in the same condition as it was when you brought it there?

A. The packages are. They are as I left them.

335 Q. But you can't identify on the receipt these exhibits or even trace them to some other box that

Testimony of Frank Hudak

might have been any item of the four sacks listed on the packages or item six that appears in the particular carton which contained 17 of these packages?

A. I think that's there under item 6.

Q. They were all for the month of April?

A. It is not indicated.

Q. No, but do you remember?

A. I would have to refer to my other notes before I could definitely state that . . .

336 Mr. McNelly: I might ask the court before we adjourn for the day to clarify his ruling in regard to Government's Exhibits 50, 51, 52 and 53.

The Court: Government's Exhibits 50, 51, 52 and 53 were admitted.

Mr. McNelly: I think by the testimony of Mr. Mueller who testified they were received from Mr. Kienzler after the raid.

Mr. O'Connell: Mr. Manning testified here that there was never a wager given or received over that telephone, and I move to strike the exhibits.

The Court: Overruled, they are admitted and were admitted this morning. They will remain admitted.

Testimony of Frank Hudak.

FRANK HUDAK

337 was then recalled as a witness for the Government, and having been previously sworn, testified as follows:

Direct Examination, by Mr. McNelly.

338 I am the same Frank Hudak who previously testified in this matter; I received from Agent Kienzler material received in the raid involved in this case on May 6th; after examining it, I deposited it in the vault in

Testimony of Frank Hudak

the Internal Revenue Building in East St. Louis; after examining Government's Exhibit 111 and the box marked 112, I can say this material was examined and the items handed to me by Special Agent Kienzler on May 6th; these articles have been in my custody and control since then, and have been maintained in the vault since then; nothing has been taken from these packages since the time he seized them and left them in my custody, nor has anything been added to them; they are now in the same condition they were when they were delivered to us.

Cross-Examination, by Mr. O'Connell.

Q. These papers and documents that were examined by you, has every one of them been examined?

A. No, sir.

Q. They were examined by somebody, weren't they?

A. While they were in my custody, yes, sir.

Q. You were not present when they were examined?

A. Not all of the time.

Q. When you say they are in the same condition as when they were delivered to you, you don't know that, do you?

A. Yes, I do, sir.

Q. Were you present when Mr. Waller and I went through all the material?

A. You were present with agents to whom I delivered them or turned them over before you saw them.

340 Q. You don't know if there was any change we might have made?

A. It is possible, I wouldn't know if you made any changes.

Q. The same way with other people who have examined these records, during the time you have had them in your custody?

A. You and Mr. Waller were there on two occasions.

Testimony of Frank Hudak

Q. On two occasions?

A. Yes, sir.

Q. Mr. William Kealey inspected the payroll records of North Sales Company, did he not?

A. He inspected them in connection with employment tax returns.

Q. You were present then?

A. No, sir.

Q. You don't know, of your own knowledge, if any change was made by him, do you?

A. No, sir, I don't.

Q. Who else went through these records?

A. Special Agent Minton, I believe a part of them, and Special Agent Mueller, sitting at the table on a number of occasions.

Q. Were you present with them?

A. Not all the time, sir.

Q. And you don't know whether any changes were made by him or not, do you?

341 A. That's right.

Q. I want to show you what has been marked Government's Exhibit 121. We have been advised that this was in part of the records seized but I have here what purports to be duplicates which have been taken from the contents of the exhibit and ask you if they appear to be duplicates?

Mr. McKnelly: We object to the testimony. The contents of Government's Exhibits 121 through 144 are not in evidence yet, your Honor.

Mr. O'Connell: The purpose of the question is to show that obviously, there is a difference in the original and duplicate.

Mr. McKnelly: There is no proof that those are originals and we object to any testimony as to the contents yet.

Testimony of Frank Hudak

The Court: The testimony on direct examination was addressed to whether or not the exhibits were in the same condition now that they were at the time the witness seized them.

Mr. O'Connell: These are the ones here are the originals the ones that have been seized.

Mr. McKnelly: We object to the conclusion of the attorney.

The Court: Are these a portion of the exhibits that this witness testified on direct examination?

Mr. O'Connell: Yes, that's what I am holding in my hand.

The Court: Come up a minute, gentlemen, please.

(Conference at the bench between Court and counsel out of the hearing of the jury.)

342 The Court: The objection is sustained.

Q. (Mr. O'Connell continuing.) Now, on the exhibits just taken from Government's Exhibit 111 that have been marked Government's Exhibits 111-D through H, can you tell from looking at them whether or not there was any change or if they are in the same condition as when you originally saw them—when did you originally see them?

A. On May 6, 1957.

Q. At that time, did you open the package?

A. Not each one, no, sir, but I went through certain of them.

Q. The ones you went through, can you testify whether or not you, at that time, saw these exhibits?

A. I can't testify I saw these particular exhibits. I saw exhibits like these, of the same nature.

Q. You don't know whether the ones you examined, were these particular exhibits and whether they were in the same condition then as they are now?

A. I see no change in them.

Q. The question is, can you testify whether or not they are in the same condition?

Testimony of Frank Hudak

A. Yes, I would say so.

Q. Do you know whether or not that date was on there when you first saw them?

A. That date is May 12, 1959. I would say no, sir, it was not.

343 Q. It has no significance at all on the exhibit?

A. I don't know. Since the change is made, it must have been put on in the court room during this proceeding.

Q. This is marked as of today, isn't it?

A. Yes, sir.

Q. There is that change then, that you know of?

A. Yes, sir, that date was put on by the Court Reporter.

Q. As to the rest of the exhibit, Frank, the only difference was you can't testify whether or not there was any change, is that right?

A. I have every reason to believe—

Q. No, no, not that. You didn't see them all the time and can't testify there has been no change?

A. I don't believe there has, none that I can testify to.

Q. You don't know of your own knowledge whether any change has been made on these, do you, you testified you have seen similar ones, but you can't testify that you saw these, can you?

A. Right.

Mr. O'Connell: We object to the exhibits. There has been no proof they have been maintained in the same condition they were at the time they were seized by the government.

The Court: The objection is overruled. The exhibits 111 and 112 will be admitted.

Mr. O'Connell: That's all.

Witness excused.

Testimony of Charles Kastner

Testimony of Charles Kastner.

344

CHARLES KASTNER

was then recalled for further direct examination and having been previously sworn, testified as follows:

(Further) Direct Examination.

I am the same Charles Kastner who testified yesterday concerning Government's Exhibit 111-F and the writing on the other side of that document, I wish to state that is my writing; the "T" means the actual total of the amount played on all of the sheets, the whole thing combined of this particular group of sheets, which is
345 the total bets; "P" put back of the total on the second column means collect that particular amount from the customer's place; if the "P" which is here was greater than the "T" on the back, these figures would be reversed; the "T" itself represents the amount bet, total amount bet on that particular sheet; I don't know what the name Joe means as it appears on this sheet; I never used it and I don't know who it is.

Cross-Examination, by Mr. O'Connell.

I am the brother of Donald Kastner and I got paid
346 a regular salary, being \$80.00 a week for the first two months and it was cut then to \$60.00; I was told that business was bad; I knew from my activity that business wasn't good, but I got paid vacation time which was paid by Mr. Clancy who was my boss and I took my orders from Mr. Clancy and I looked to him as my
347 boss, and Donald Kastner was about in the same position as I was, and Donald and I were ribbon clerks, so to speak, and Donald got a salary but I couldn't tell you how much, and I didn't know that he made \$80.00 a week; Donald took orders from Clancy so far as I knew,

Testimony of Charles Kastner

and Donald and I just about performed the same duties; Social Security and withholding tax was paid by
348 the company and I considered myself an employee and agent of the North Sales Company; Government's Exhibits 121 through 144, to the best of my knowledge were records of the North Sales Company, and I am the man that made these out, and I knew the procedure; this is the customer's record, the customer
349 gets the original copy; I just looked at the top one and they are the originals, the customers records;
350 I don't know whether these are the records seized in any raid by the Government; the customer's record should be at the customer's place of business, but I don't know whether they were or not; I operated at different places and at different telephones; no one worked with me, I was alone after 9:00 in the morning; I worked
351 at different places and I worked "at large"; I wear glasses for some things, for reading but not necessarily; I can read with or without them, but it is easier if I read with them; I don't remember whether "Bobby" would exceed 50% of the bets and layoffs or whether
352 it would be 5%; as a matter of fact, all of the testimony given about making the route wasn't made by me; all the talk about all the stops I made in 1957 was not true in 1957, since I never made the route then;
353 my wife made the route in 1957 and she is presently under arrest and the Government has impounded her car and I made a deal with the Government to give my car back, and my wife and I were together when we were at that conference, and the Government gave me the car back after six months; my wife is still under arrest and her hearing is coming up, and the Government has promised my wife leniency if I cooperated . . .

Testimony of Press Waller

Redirect Examination, by Mr. McKnelly.

354 I never went on the route with my wife; I didn't say that I usually made the settlement sheets, Government's Exhibits 111, in 1957. The ones like that were usually made by the partnership . . . To my
355 knowledge, the only place my brother worked was above Zittel's Tavern, but I did not see him take bets there . . .

Recross Examination, by Mr. O'Connell.

359 The "Bobby" I refer to is Otto Pohlman and he is now dead; it seems to me he died about six months ago.

Testimony of Press Waller.

PRESS WALLER

was then called as a witness for the Government, and
360 being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Press Waller and I am self employed as an accountant and bookkeeper with my office located in the Murphy Building in East St. Louis; I know the defendants and I have performed accounting services for them under the name of North Sales Company; I prepared Government's Exhibits 1 through 29; I obtained the information for the preparation of the income tax returns from information furnished me and from the knowledge on that stack of copies showing the total paid back and wins or losses, and Exhibit
361 111-F was never in my office; the small white ones I couldn't identify because if they came in they were in a bag and I didn't examine them; usually, Mr. Clancy

Testimony of Martin O. Mochel

A. It does.

Q. Will you tell the court and jury whether you know from your own knowledge whether a wagering stamp was issued to the defendants pursuant to that application?

A. Yes, sir. . . .

Testimony of Martin O. Mochel.

MARTIN O. MOCHEL

373 was then called as a witness for the Government, and being first duly sworn, testified as follows:

Direct Examination, by Mr. McKnelly.

My name is Martin O. Mochel and I am employed at Springfield, Illinois by the District Director of Internal Revenue as an Internal Revenue Agent in the auditing
374 division, Field Audit, Group 11, Excise Group; on December 13, 1956, I was in East St. Louis and I went to the office of Press Waller, and there I met Mr. Thomas Clancy and also Mr. Waller and Mr. Kealey; I was accompanied by Agent W. L. Buescher; at this time I interviewed Mr. Clancy together with Mr. Buescher, with respect to his—

Mr. O'Connell: We object to this testimony and ask
375 it be stricken, or at least restricted to Mr. Clancy since it is not admissible against Mr. Prindable or Mr. Kastner, and we would like that same objection throughout, your Honor.

The Court: You may have your objection and the objection is overruled.

I asked Mr. Clancy with respect to his particular place of business for wagering, and his answer was that there was no particular place of business, although his residence at 2401 Ridge Avenue was the address used for the wagering tax business; Mr. Clancy stated that the partners of

Testimony of Martin O. Mochel

North Sales Company were himself, James Prindable and Donald Kastner; I inquired from Mr. Clancy regarding any agents accepting wagers for the North Sales Company, and he stated that during January, 1955 through June, 1956,

they had one agent, Charles Kastner; that at the
376 same time, starting in July, 1956, they had another agent whose name was Malcolm Wagstaff, accepting

wagers, and that with the exception of these two men, they did not have any agents accepting wagers for them; the following day on December 14, 1956, I again went to Mr. Waller's office for the purpose of interviewing James Prind-

able and Donald Kastner, and Mr. Buescher again went with me, and Mr. Press Waller was also present; that day,

I interviewed Mr. Prindable and asked him his relationship he had with the deal with respect to accepting wagers and also the manner in which the wagers were paid off, whether

he paid them, his own winners, and he stated he did in person; I asked him if he laid off any wagers and he stated,

they did not; I asked him what happened when
377 people wanted to place large bets with him, and he stated if the bet was too large, he just refused that

bet; in the conversation, I asked him if he might recommend they call someone else to place the bet in the locality, and he stated he didn't even know of any other horse book-

ies; I have been employed by the Internal Revenue
378 Service since November 27, 1942. • • • I have made approximately 500 tax audits and approximately 200

have been wagering tax audits; I have had occasion to examine and study Government's Exhibits 54 through 109; Exhibits 54 through 79 are dated for the month of March,

1957 and are dated consecutively with the exception
379 of Sundays, and I have prepared a computation in regard to these exhibits; I have totaled them and

each carries a total at the bottom of each particular sheet; they are dated and I prepared work sheets which disclose

Testimony of Martin O. Mochel

the totals of the column with respect to these sheets for this month; Government's Exhibit 115 is the work sheet I prepared showing the total of the columns on these 380 exhibits; and it shows my computation of Government's Exhibits 54 through 79; I have examined Government's Exhibit 111 and its subnumbers, and I can identify the documents contained in that package as wagering slips, bet slips, which I have summarized for this particular day; I opened this package and I photographed all of these bet tickets and prepared work sheets showing each individual bet; Exhibits 111-SSS is the 381 National Turf program, showing the scratch sheet of May 3, 1957; Exhibit 111-T is dated May 3, 1957; all of the bet slips in that package have been recorded and totaled; as far as the gross wagers, the "T" was totaled as 382 the take amount of the bet; these individual tickets were not totaled as a separate item; they were listed and considered with the whole summary sheet, item for item, and totaled; Government's Exhibit 108 is dated May 3, 1957 and I compared all these slips with that and they matched perfectly.

Mr. O'Connell: May I object to this preliminary work as to the summary? He has testified he compared them and they matched. This is March, 1957, and he is now testifying as to Exhibits dated May 3, 1957.

Mr. McKnelly: It is proof of their method of bookkeeping, your Honor. We can show that through bundles of paper marked May 3rd.

Mr. O'Connell: Could we talk in the chambers out of the hearing of the jury? * * *

383 The Court: It will be admitted for the sole and only purpose of showing the method of bookkeeping. It is not to be considered for anything else or for any other purpose.

Government's Exhibit 111 has two scratch sheets, dated

Testimony of Martin O. Mochel

May 3rd. Each scratch sheet came out on the day the race was run, and outside of the racing form is dated May 4th. Each gave the results of the wagers at the race track for the prior day, so these would give the results of the bets that had been placed by the bet tickets. • • • The
384 bets shown by these tabs check out with the bets shown on the sheet. In Government's Exhibit 115 I used the same method of computation in adding the figures up for the month of March, 1957. For this particular month I was able to determine from the bet tickets.

385 Mr. O'Connell: We object to that. He has told about these bet tickets and—

A. What I meant to say was from these bet tickets I was able to determine what was placed on the summary sheet for May 3rd.

Mr. O'Connell: We object to that.

The Court: He didn't use the word "matched" in the last answer. Proceed.

I used that to determine what the column represented on the summary sheet; then from the reflection of what this column was I prepared the summary sheet showing the total of each column of the sheets in the month of March, and again they represented the same portion of the bet tickets, the winners, the amount taken in or paid out, the amount won or lost for the month of March, and I added each column of the four columns on the summary sheet and put the total of each of them on the work sheet on Government's Exhibit 115; the amount of \$68.00 opposite the letter "T" on Exhibit 111-I appears on Government's Exhibit
108 as a circle in the first column of the summary
386 sheet; the "P" there is blank and the third column \$68.00 and the fourth column also shows this; I used the method of bookkeeping which I have just testified to in adding the totals of Government's Exhibits 54 through 79, and I transposed those totals to Government's Exhibit 115.

Testimony of Martin O. Mochel

Mr. McKnelly: We reoffer it in evidence, your Honor.

Mr. O'Connell: We object to it on the basis when he outlined the procedure here. It was necessary to use the bet slips and there has been no introduction for March that the bet slips he used in it were used to prepare the summary.

Mr. McKneely: It shows the bookkeeping system by the previous testimony as to the summary sheet for the month, your Honor.

The Court: Overruled. Exhibit 115 will be admitted into evidence.

In the "T" column, the first column having a total, each of the sheets dated during the month of March, 1957, Government's Exhibits 54 through 79, the total for Column 1 is \$103,441.30; that is the total for that month; referring to Government's Exhibit 110, page 27, the date there is March, 1957; the total of column 1 on that sheet is \$11,913.00; the amount reported by the defendants on Government's Exhibit 9 as wagering is exactly the same as the amount of gross wagers accepted during the month of March and that amount is \$11,913.50, and they paid \$1,191.35 tax; the amount of tax on gross wagers of that amount would be \$10,414.00; Government's Exhibit 114 is a reproduction of one of the summary sheets for Saturday, March 30, 1957, and accurately reflects Government's Exhibit 79, both front and back.

388 Mr. McKnelly: We offer in evidence these exhibit numbers explained by the witness, your Honor.

Mr. O'Connell: My objection is to the enlargement of the sheets; I think the Exhibits themselves is the best evidence, that is the original documents themselves.

The Court: Overruled. It will be admitted.

389 In making my computation of Government's Exhibit 115 for March 30, 1954, it shows four columns, and this was the total for column 1, which was taken from

Testimony of Martin O. Mochel

“T”; I performed an audit of the records of North Sales Company on December 11th and 12th, 1956; at that
390 time I went to Mr. Waller's office in the Murphy Building and he presented me with a considerable batch of records, considerable numbers of bet tickets in the packages.

Mr. O'Connell: We object unless the witness will state what year he was performing the audit.

A. January, 1955, through October, 1956, to the best of my recollection.

Mr. O'Connell: I renew my objection. The audit he is telling us about has no bearing on the issues in this case.

The Court: Overruled.

I was furnished with wagering bet tickets in bundles, sometimes a day and a week; they were large bundles and each day was bound with an adding machine tape, showing the totals on the tape and also they furnished me with ledgers which disclosed the entire amount as to the gross wagers, and the winners and certain expenses for

391 each day of the period; during the period from January 1955 through October 1956, I found the returns filed were correct according to the books and records furnished to me; during the audit, I did not have access to Government's Exhibits 54 through 109; during that audit, I was not furnished with any long, narrow, sheets like Government's Exhibit 111-F; all I had was those approximately 3 x 5 sheets; some may have been 4 x 6 sheets; I recognize Government's Exhibits 121
392 through 144; at the time I looked at them they were seized; I first saw these tickets in the office of Otto

Pohlman Newsstand; I was present there on the raid on May 6, 1957 and searched the premises in this room; I personally secured them and examined them at that time;

Mr. McKnelly: We offer them in evidence, your Honor.

Mr. O'Connell: We object to the offer on the ground

Testimony of Martin O. Mochel

there has been no proof that they are in the same condition now as when seized, and no proof that they were seized pursuant to a duly authorized warrant, and a further objection is that one of these exhibits, at least
393 one, was Otto Pohlman's and Otto Pohlman is now dead and not here and subject to cross-examination on the exhibits.

The Court: Overruled. They will be admitted.

Cross-Examination, by Mr. O'Connell.

I received my training and education in Shelbyville; I have no degree and no formal education; I am not a C. P. A. and I am not actually an accountant, although I have taken the course in elementary corporation accounting; the Government has C. P. A.'s working for
394 them, and I don't know the correct accounting procedure other than what the Government has taught me, except for what formal experience I have had over all the years in that business; I operated a wholesale tobacco and candy firm prior to going to work for the Government.

Q. Then you wouldn't know then in business or in a corporation business when an audit is made whether the original invoices are not considered essential and an essential part of the accounting procedure in the making of an audit? In the making of an audit, don't you always go back to the original source in excise tax?

A. I start with the original invoices. . . .

395 I made a report after my interview in the office of
398 Mr. Waller on December 13th and 14th, 1956. . . .

To my memory we didn't ask Mr. Kastner whether or not there were any other agents; any remarks made by Prindable or Clancy I am not attributing to
400 Kastner. . . . When we interviewed Clancy, Prindable and Kastner, we made no attempt to put

Testimony of Martin O. Mochel

them under oath or to advise them of their constitutional rights, or that any statement they were making could be used against them in a criminal prosecution.

Q. Did you at any time explain to them what you meant by a partnership?

A. No, sir.

Q. Did you at any time explain to them what you meant by an agent or an employee?

A. No, sir.

Q. Do you, sir, know what an agent or employee is?

Mr. McKnelly: We object to that. That's asking for a conclusion of law of the witness.

The Court: He may answer if he knows.

A. I don't know in technical terms.

401 Q. You don't know that?

A. My opinion of the agent or employee, of course, is an agent as used in wagering.

Q. You didn't explain what it meant?

A. As far as wagering is concerned; we inquired as to agents accepting wagers.

Q. Did you explain to them what the term agent meant in reference to what they told you?

A. We did not define it to them, if that is what you mean. . . .

403 Q. Has there been any attempt made on that summary sheet to classify the gross receipts according to the type of bets?

A. What type do you mean?

Q. In any manner at all, has there been any classification made?

A. Just the racing information from the records.

Q. Has there been any classification made?

A. No, just gross wagers.

Q. In respect to wagers on horses, has there been any attempt made to classify the type of the wagers or what type of wagers it was?

Testimony of Press P. Waller

A. What type? I think they are all horse bets.

Q. Could you tell from this Exhibit here which of the sums was represented by receipts from lay off bets, and which were reported as receipts?

A. I had no evidence of any lay off bets receipts.

Q. And none is shown here?

A. No, as far as I know. I had no evidence of any lay off bets.

Q. In none of these forms or none of the papers seized, is there any attempt to differentiate between lay off bets and regular bets, is there?

A. I had no evidence of lay off bets.

Q. Answer the question. In any of the papers you made the report from—that's the only place you got that sheet or these sheets?

404 A. Yes, sir.

Q. And no attempt was made to differentiate between lay off bets and regular bets or straight bets, was there?

A. No, sir. . . .

Testimony of Press P. Waller.

PRESS P. WALLER

was then **recalled** as a witness for the Government, and having been previously sworn, testified as follows:

I am the same Press P. Waller who testified previously; I recognize Government's Exhibits 116, 117, 117a, 118 and 119, but not 120; these documents were prepared in my office and are the partnership returns for North Sales Company; the partners shown on the returns are Thomas Clancy, James Prindable and Donald Kastner.

Mr. O'Connell: We object unless they are admitted into evidence.

Testimony of Norman J. Mueller

Mr. McKnelly: We offer them in evidence since he prepared them.

Mr. O'Connell: We object to them unless they are restricted in the same manner as the other Exhibits that were introduced.

Mr. McKnelly: They are offered to show the partnership, Your Honor.

406 The Court: Government's Exhibits 116, 117, 117-A, 118 and 119 will be received in evidence as showing the partnership only.

Cross-Examination, by Mr. O'Connell.

Tom Clancy's signature appears on Exhibits 118 and 119; I had no dealings with anybody other than Tom Clancy; he handled all of the affairs of North Sales
407 Company and the statements as to the facts of the partnership came only from Tom Clancy, and all of the papers that have been signed in connection with the business have been signed by Mr. Clancy.

Mr. O'Connell: Once more, we move to strike the Exhibits on the ground a partnership cannot be alleged to be established by a mere legal conclusion of the parties.

The Court: Overruled.

Testimony of Norman J. Mueller.

NORMAN J. MUELLER

was then recalled as a witness for the Government, and being first duly sworn, testified as follows:

I am the same Norman J. Mueller who testified previously;
408 Government's Exhibits 121 through 144 have been examined by me before, and I have made computations regarding them; the figures on the front of it show 2-1 and run consecutively, 2-2, 2-4, 2-5, 2-6 and so on; the numbers missing are 2-3, 2-10, 2-17 and 2-24.

Testimony of Norman J. Mueller

Mr. McKnelly: We ask the court to take judicial notice of the fact the only year in which the Sundays were on the 3rd, 10th, 17th and 24th, since the beginning of the 409 North Sales Company, was the year 1957. I made a computation of the earnings as shown from the bets on the Exhibits here in the "T" which represents the take after having added those up; the figure I reached was \$11,933.00.

Mr. McKnelly: We offer in evidence Government's Exhibit 145 representing the summary of the computations of Mr. Mueller.

Mr. O'Connell: Objection.

410 The Court: Sustained.

The gross wagers shown by Form 730 for February, 1957, were \$11,449.00; Donald Kastner told us when we interviewed him on July 23, 1957, what the nickname "Bobby" and "Joe" stand for; he said the "H" bets were from Pohlman and he also identified "Bobby" as being bets from Pohlman, which was bets Pohlman received 5% of the gross wagers; "Bobby" represents bets in which he shared in the net profit of 50% • • •

412 The Court: The jury may have a recess.

(The following proceedings were had in chambers, out of the presence and hearing of the jury:)

Mr. O'Connell: I would like, at this time, in addition to filing our motion at the close of the Government's case, to move all the evidence in this case seized from the raid of May 6, 1957, be stricken on the ground that it was obtained as the result of an illegal search and seizure, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The Court: The motion is denied.

Mr. O'Connell: I now object to the admission of the Exhibit 110 and the 29 pages comprising it on the basis that the exhibit has no material place in this case, neither

Testimony of Norman J. Mueller

does it have any bearing on the case because it is for years other than 1957.

Mr. McKnelly: It shows in 1956 and there is a conspiracy alleged in the indictment and the overt act is in keeping two sets of books.

The Court: The objection is overruled, and Government's Exhibit is admitted in evidence if it has not heretofore been admitted.

Mr. O'Connell: I would like to further move that Government's Exhibit 110 be limited and the jury be
413 instructed that their consideration of Government's Exhibit 110, their deliberations should be limited to count 5 of the indictment, the conspiracy count.

Mr. McKnelly: It is also listed as an overt act in count 4. That goes back and covers all of 1956 and even though it is prior years, your Honor, the evidence is competent to prove intent.

The Court: Do you want to correct this motion filed by you?

Mr. O'Connell: Yes, your Honor.

The Court: I will hear you gentlemen if you have anything to say on the motion for acquittal.

(Argument had.)

The Court: The motion for acquittal is denied.

Mr. O'Connell: We would like permission to recall for further cross-examination, the witness, George Kienzler, your Honor.

The Court: Very well, you may do so.

Testimony of George Kienzler

Testimony of George Kienzler.

GEORGE KIENZLER

was then recalled by the defendants' counsel for further cross-examination, and having been previously sworn, testified as follows:

(Further) Cross-Examination, by Mr. O'Connell.

414 I am the same George Kienzler who testified previously regarding Government's Exhibit 112 containing racing forms with material documents contained therein, and I testified as to the records contained in that particular box that was seized that day.

Q. You also testified it was in the same condition today as it was then?

A. The box is. I think I mentioned there had been some of these bundles taken out of the box since that time.

Q. You think you did that? Did you mention that?

A. The record would show.

Q. I will ask you to count them and see how many of them are in there.

A. 28 I see now.

Q. Upon counting you have determined now, Mr. Kienzler, there are 28 in there?

A. Yes, sir.

Q. Therefore, your previous statement that the box is in the same condition as when you brought it in is not true?

415 A. That was in reference to the box.

Q. The box, itself?

A. The box, itself? Yes, sir, that's what you asked me.

Q. The box and the condition of the box has no significance in this case, does it?

A. Well, it was one of the items seized.

Q. And you brought it to Mr. Hudak?

Testimony of George Kienzler

A. Yes, sir.

Q. When you brought it to Mr. Hudak, it contained 17, is that correct?

A. Yes.

Q. And it now contains 28?

A. That's right. I explained the other day about that. . . .

Recross-Examination, by Mr. O'Connell.

416 Q. There was 17 of them in the box when you delivered them?

417 A. Yes, sir.

Q. You say you had paper sacks?

A. Yes, sir. The paper sacks contained racing forms.

Q. What is in it today?

A. It is not in the court room.

Q. Of the nine racing forms in your receipt, none are in the paper sack?

A. I didn't say they were found in a paper sack. They were found in the buffet. We put them in a paper sack to transport them from the premises at 2300a State Street to the office.

Q. There were nine of them?

A. Yes, sir.

Q. And this calls for 17 of them, is that right?

A. That's correct.

Q. Add these together and you get 26?

A. Yes, sir.

Q. And you counted 28?

A. Yes, sir.

Q. Besides the one that is sitting there, that correct?

A. Yes, sir.

Q. You made an accurate count at that time, did you not?

A. Yes, sir.

Testimony of George Kienzler

Q. That's part of your training to make accurate counts, isn't it?

418 A. Yes, sir. * * *

(Further) Recross Examination, by Mr. O'Connell.

Q. In your receipt I notice in item 4 you list 9 racing forms and in item 6 you say 1 carton bearing the name Gordons Distilled Gin, Dry Gin containing 17 racing forms. In Item Number 11 you say miscellaneous racing forms and racing form records. You show that different in another previous report, don't you, racing forms and racing form records. What's the difference between the two?

A. May I see what you are referring to, sir?

Q. Yes. Referring to Items 4 and 6 and Item 11, which is listed on your return.

419 A. Item 4 represents the paper sack containing 9 racing forms in which each or in which are bound white and yellow notes and 11 yellow pads, one of which contains pencil notations. Item 6 lists one carton box containing 17 racing forms, in which are bound various notes and memos. Item 11, miscellaneous racing forms records and papers. What is the question now?

Q. And you show a difference in the material advisedly, don't you, by the use of the racing forms, one you show as racing forms and the other as racing form records?

A. Item 11 covers racing forms and records.

Q. Racing form records isn't one of these, is it?

A. Well, what we call that a scratch sheet.

Q. Would you call that also a racing form record?

A. I wouldn't refer to it that way personally, no.

Q. What did you refer to when you seized it, what did you refer to as racing form record?

A. I think the word is automatic from the receipt here.

Q. You wrote the receipt, didn't you?

Testimony of George Kienzler

A. Yes, sir, that's right. Miscellaneous form records and papers, it says. Perhaps I omitted the comma.

Q. You were specific in your count of the racing forms in the buffet which covers those in the Gordon's Gin box. Why would you refer to miscellaneous racing forms or miscellaneous form records, why refer to them as miscellaneous without listing the number?

420 A. There were a number of documents covered in Item 11, but they were shown to Mr. Kastner at the time and they included three racing forms in which eight represented the various papers and records which also included 54 of the yellow summary sheets, which were in this same place in the buffet, and part of the white or a number of white columnar sheets. I think I gave you the wrong number of yellow sheets. I don't believe there were that many, not sure as to the number.

Q. George, is there any reason why you would count specifically the racing forms in referring to these as racing forms, is there any special reason why you would count those that were in the buffet and then describe them as miscellaneous racing form records? It gives the impression they are small pieces of paper.

A. It don't mean that to me. I omitted a comma here.

Q. Did you have any reason for not counting the racing forms when you were so specific in the other?

A. No, I don't think there was a particular reason for not listing the number. I reported it and took it along as part of the property seized.

Q. But you didn't count them at the time of the receipt?

A. No, but the receipt was prepared in Mr. Kastner's presence.

Q. Right now, you can't actually state whether the material therein was actually the same material that was seized, can you?

Testimony of George Kienzler

421 A. Yes.

Q. You didn't count it and you don't know how many miscellaneous racing forms there were, do you? There were the racing form records which you counted but you don't know they were in the same condition then that they are now, do you, or how many of them there were all told?

A. There were 17 of those racing forms that were in the box sitting on the radio in the room, 9 of them in one side of the buffet which I put in a paper sack. The other three were in another section of the buffet with the other miscellaneous records.

Q. Where did you put those?

A. In another sack.

Mr. O'Connell: I renew my motion and my objection to the admission of Exhibit 112 into evidence on the basis that it has not been established it is now in the same position as it was when it was seized and further, we don't know, and it has not been established they are in the same condition as they were then and some of these were not seized during the raid.

The Court: The motion is denied.

Mr. McKneely: The Government will stipulate the documents marked Defendants' Exhibits 1 and 2 may be admitted in evidence and also stipulate and agree during the fiscal year, June 30th, 1956 to 1957 that a
422 wagering stamp was issued to the North Sales Company pursuant to the application in evidence here.

Mr. O'Connell: I would like, at this time, to object pursuant to agreement between Government and Defendants' counsel that no objection would be made by
424 the Government on the grounds that this objection comes too late, to the exhibits heretofore offered in evidence by the Government and we move that Government's Exhibits 111-A to 111-Z; 111-AA to 111-ZZ;

Testimony of George Kienzler

111-AAA to 111-ZZZ; 111-AAA to 111-RRR; 112-A to 111-A-120; 111-B-1 to 111a-B-76; 111-C to 111-C-109; 112-D-1 to 112-D-38; 112-E-1 to 112-E-37; 112-F-1 to 112-F-35; 112-H-1 to 112-H-85; 112-G-1 to 112-G-36; 112-I to 112-I-35; 112-J-1 to 112-K-78; 112-K-1 to 112-K-32; 112-L-1 to 112-L-30; 112-M-1 to 112-M-34; 112-N-1 to 112-N-35; 112-P-1 to 112-P-30; 112-Q-1 to 112-Q-30; 112-R-1 to 112-R-30; 112-S-1 to 112-S-32; 112-T-1 to 112-T-40; 112-U-1 to 112-I-37; 112-V-1 to 112-V-43; 112-W-1 to 112-W-31; 112-X-1 to 112-X-34; 112-Y-1 to 112-Y-43; 112-Z-1 to 112-Z-30; 112-AA-1 to 112-AA-33; 112-BB-1 to 112-BB-41 be stricken on the ground that said exhibits are immaterial, incompetent and irrelevant and have no bearing on the issues in this case; that said exhibits have not been properly identified; that said exhibits have not been connected up with the defendants in this case; that said exhibits have not been shown to be in the same condition now as when seized on May 6, 1957; that said exhibits were seized illegally and that said exhibits represent the private records of the defendants and were seized in violation of the Fifth Amendment of the Constitution of the United States, and said seizure, said search was in violation of the Fourth Amendment of the Constitution of the United States and for the further reason that no proper foundation has ever been laid for the amendment—no proper foundation has ever been laid for the admission of said exhibits in
424 that none of these exhibits, of the exhibits 111 have been identified as being in the handwriting of the defendants and that the testimony is the handwriting on the exhibits contained in 111 was admitted by the person who made the identification not to be a handwriting expert and that he could be mistaken in the identification of said handwriting.

The Court: The objection is overruled.

Mr. Raemer: The government offers, at this time, the

Court's Instructions.

affidavit of Douglas H. Reed concerning the selection of the petit and grand jury.

The Court: Do you have anything to say about that offer, Mr. O'Connell?

Mr. O'Connell: To which the defendants object on the basis of the Court's decision already having been made overruling the defendants and that the time is past for the filing of any such evidence. That in the motion, defendants or government was requested to submit affidavits and if no others were submitted, the defendants' affidavit would stand as evidence and the Government has failed up to the time of argument and decision of the Court to file such affidavit so that it comes too late at this time.

The Court: The objection is sustained.

COURT'S INSTRUCTIONS.

426 The Court: Ladies and gentlemen of the jury, at the close of a case, it is the duty of the Court to instruct you regarding your obligation as jurors and also as to the law pertaining to the case under consideration. It is the exclusive function of the Court to determine and give you the law and the law which the Court gives you in these instructions must be accepted by you as the law pertaining to this case regardless of what your own personal judgment might be as to the law.

It is the exclusive function of the jury to find and determine the facts and having done so, you are to apply those facts as you find them to the law given to you in these instructions, which are, and should be regarded by you as one connected series of instructions and you should apply them to the facts as a whole and not detach or separate any portion of the instructions from the remainder but you should consider them as one connected series of instructions as to the law pertaining to this case.

Court's Instructions

Neither by these instructions, nor by any word uttered or remark made by this Court does he or did he intend to, or mean to give, or wish to be understood as giving, any opinion, any opinion as to what the facts are, or what they are not.

When a crime has been committed, the witnesses knowing the facts concerning the crime are brought before the

Grand Jury of this district to testify concerning
427 such crime. The Grand Jury, if they are satisfied with such testimony, will return an indictment. An indictment is the charge made by the Grand Jury against the person or persons named therein charging him with the commission of a crime. The defendant is then brought into court and given the right to plead either guilty or not guilty. If he pleads not guilty, an issue is made up which then must be tried by the jury and that is what you are here to do. The Court is permitting you to take with you the indictment returned by the Grand Jury, however, the indictment is not evidence. It is merely a formal charge, and is not to be considered by you as any evidence. It is, as I said, merely the formal charge returned against these defendants by the Grand Jury.

Also, as I stated to you when you were being impaneled, any statements made by any of the attorneys in the case is not testimony and is not to be taken by you as such. Neither is any statement as to the law in the case made by any of the attorneys to be considered by you because the Court will give you the law. That is what the Court is doing now, giving you the law which is applicable to this case.

In every case tried in court, the defendants are presumed to be innocent until proven guilty. That presumption of innocence remains with the defendants throughout the entire trial and is not a mere figure of speech to be disregarded by the jury at will, but it is a substantial

Court's Instructions

right of the defendants granted to them by the law of the United States.

428 As I said before the indictment is simply the charge made by the Grand Jury that these defendants have committed a crime. It is for you to determine now whether they did or whether they did not do what the indictment says they did. The burden of proving the charge in the indictment is upon the government and it is required to prove the charges as set forth in the indictment beyond a reasonable doubt. If the government proves its case as laid in the indictment beyond a reasonable doubt, then it would be your duty to find the defendants guilty and to return a verdict of guilty. If, however, the government does not prove its case as laid in the indictment beyond a reasonable doubt, then it would be your duty to return a verdict of not guilty.

Reasonable doubt means exactly what the words indicate—a doubt that is reasonable taking into consideration all the evidence and the law as given you by the Court in these instructions. It does not mean that you have the right or privilege to go outside the evidence to hunt up doubts. And a fanciful imaginary doubt that does not arise from the law and the evidence should not enter into your verdict in this case. There is nothing mysterious about the term "reasonable doubt". It is not for the purpose of permitting guilty men to escape, but it is a rule for the protection of the innocent.

Reasonable doubt does not mean a possibility of a doubt or a probability of a doubt, or a speculative doubt, 429 but it is a substantial doubt based upon the evidence or lack of evidence in the case. If upon a consideration of all of the evidence in the case you have an abiding conviction of the guilt of the defendant, or any one of them, amounting to a moral certainty, then he, or they, have been proven guilty beyond a reasonable doubt, and it would be your duty to find them guilty.

Court's Instructions

Jurors have no right to consider the defendants to be guilty of any other charge except the charge stated against them in the indictment. The charge in the indictment is the only charge on which the defendants can be convicted, and, unless the government proves the defendant guilty beyond a reasonable doubt of the charges set forth in the indictment, you must return a verdict of not guilty.

The only way you have of determining the facts in each and every case you try is from the evidence. You, as jurors, are the judges of the facts, the weight to be given to the testimony and of the credibility of the witnesses. The only way that I can help you to determine the credibility or weight to be given to the testimony of the respective witnesses is to tell you that you should have paid close attention to the testimony given by the several witnesses; observed the conduct and the demeanor of the witnesses while testifying; and from observation determine whether or not they told the truth or whether they did not tell the truth; whether they knew what they were talking about or whether they didn't know what they were talking
430 about; whether or not they had a particular prejudice or biasness or feeling in the outcome of the case; whether or not they were related to the defendants or whether or not they were, in any way, interested in the outcome of the case.

From all these observations you should then be able to determine the credibility of the witness and what weight should be given to his testimony.

If you find, upon a consideration of the evidence that any witness for either side has willfully testified falsely to a material fact, you may disregard the entire testimony of such witness except in so far as such witness may have been corroborated by other credible testimony; or you may accept so much of such witness' testimony as you consider truthful and disregard the balance.

Court's Instructions

If you find from the testimony that the defendants have been proven guilty beyond a reasonable doubt, you have no right because of sympathy, prejudice, biasness, feeling or consideration of what his punishment may be, to absolve or free him from the consequences which follow the violation of law. Sympathy, prejudice, biasness, or feeling has no place in a law suit.

You are not to suffer yourselves to be prejudiced against the defendants herein simply because they are the defendants and charged with the commission of an offense, nor to convict them for fear that crime may go unpun-
431 ished or for the purpose of deterring others in the commission of like offenses. You must not convict these defendants unless every fact necessary to establish their guilt has been proven to your satisfaction beyond a reasonable doubt.

Circumstantial evidence is competent evidence. In fact, it is sometimes the best evidence, particularly in cases involving offenses which are susceptible to easy concealment from the eyes of others. The force and value of circumstantial evidence depends upon the number of facts and circumstances established which are consistent with each other and the consistency of those facts and circumstances with the truth or existence of the facts sought to be shown. Thus, an isolated fact which might indicate a commission of the act, might be of little value in establishing the commission of the act, although under peculiar circumstances, such isolated fact might be very convincing. Yet, if a number of facts are shown which are all consistent with each other and consistent with the defendants guilt, and inconsistent with all reasonable theory or hypothesis of his innocence, such facts may be safely relied upon as establishing the ultimate fact of guilt, if you are thereby convinced of such guilt beyond a reasonable doubt.

The weight to be given to circumstantial evidence can be

Court's Instructions

stated very simply and it is this: To the extent that the government's proof in this case is circumstantial, those circumstances relied upon to convict must be consistent with guilt alone and not consistent with innocence or the balanced hypothesis of either guilt or innocence. In order to justify a jury in finding a verdict of guilty based entirely or substantially on circumstantial evidence, the facts sought to be established by circumstantial evidence must not only be consistent with the guilt of the defendants, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence.

In the fifth count of this indictment, a conspiracy is charged. It is charged that these men, among other things, formed a partnership for the purpose of violating the law by evading the payment of the tax with which they are charged. A conspiracy may be proved by circumstances or circumstantial evidence alone if such circumstances convince you of the truth of the charge beyond a reasonable doubt. In a conspiracy, any overt act done in pursuance of the common plan serves to establish the existence of the conspiracy. As to these overt acts, the government need not prove all of the overt acts, and there are three charged in the fifth count of the indictment. Proof of one overt act being sufficient providing such overt act is done to effecuate the object of the conspiracy and the act of one conspirator is the act of all of the conspirators. In this connection, the Court instructs you that the statute provides that if two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be guilty of the crime of conspiracy. I will have more to say about that later.

Court's Instructions

Counts I, II and III of the indictment charge Thomas Clancy, Donald Kastner and James A. Prindable, respectively, with violating Section 1001, Title 18, of the United States Code. That statute provides, in part, that "Whoever, in any matter within the jurisdiction of any department or agency of the United States. . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined or imprisoned . . ., or both."

In regard to Counts I, II and III of the indictment you are instructed that whether the statements made by the defendants were material to the matters then being investigated and whether the statements were made in a matter within the jurisdiction of a department or agency of the United States, are both questions of law for the Court.

If you find beyond a reasonable doubt that the interviews took place as alleged and that during the course of such interviews as alleged: (1) Thomas Clancy stated that he, Donald Kastner and James A. Prindable, partners doing business as the North Sales Company, had no employees or agents accepting wagers on their behalf, other than Charles Kastner and Malcom Wagstaff; and (2) Donald Kastner

stated that he did not know the names of individuals
434 accepting wagers as agents of Thomas Clancy, James

A. Prindable and Donald Kastner, partners doing business as the North Sales Company; and (3) James A. Prindable stated he did not know of any other individuals accepting wagers in the operation of a horse book except Thomas D. Clancy, James A. Prindable and Donald Kastner, partners doing business as the North Sales Company; then you are instructed, ladies and gentlemen, that the statements were material to the matters then being investigated, and that the statements were made in a matter within the jurisdiction of a department or agency of the United States.

You are further instructed, that, in regard to Counts I,

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II and III of the indictment, whether the statements were made under oath is of no significance. That the statements were not made under oath has no effect upon the question as to whether or not there was a violation of the statute.

The Count instructs the jury that if you find and believe from the evidence that defendants made the statements alleged under Counts I, II and III of the indictment, you must acquit any defendant that did not make the statement knowingly, and wilfully with intent to deceive Internal Revenue Agents.

You are instructed that in order to find that the defendants Donald Kastner and Thomas Clancy made false statements to Internal Revenue Agents as charged in the indictment, you must find that the defendants did in fact
435 have other agents other than Charles Kastner and Malcom Wagstaff. You must find that these statements were made wilfully and knowingly, and that the statements were in fact false, fictitious and fraudulent.

To establish its case in the first two counts of the indictment the Government must prove beyond a reasonable doubt the following three elements: First, that on or about the days designated in the first two counts of the indictment that the defendants were engaged in the business of accepting wagers; Second, that the fact the defendants had agents and employees working for them, other than Charles Kastner and Malcom Wagstaff; Third, that each defendant wilfully made a false statement to Internal Revenue Agents knowing the same to be false.

Under Count IV of the indictment, the defendants are charged with violation of Title 26, Section 7201 of the United States Code. This statute provides in part that "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * *, be guilty of a felony, and, upon conviction thereof, shall be fined, or imprisoned, or both."

Court's Instructions

You are instructed that in regard to Count IV of the indictment, if you find that a fraudulent wagering excise tax return was filed by the defendants with intent to defeat a substantial amount or all of the wagering excise tax during the fiscal year ending June 30, 1957, and that this 436 was done wilfully, the crime is complete as soon as the filing takes place.

To establish its case under Count IV of the indictment, the Government must prove beyond a reasonable doubt the following three elements:

1. That during the period charged in the indictment the defendants were engaged in the business of accepting wagers;
2. That substantial excise tax on those wagers was due and owing by them to the United States;
3. That the defendants wilfully attempted to evade and defeat the tax.

The gist of the offense charged in Count IV of the indictment is a wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the Internal Revenue Code. The word "attempt" as used in this law, involves two things:

1. An intent to evade or defeat the tax; and
2. Some act done in furtherance of such intent.

The word "attempt" contemplates that the defendants had knowledge and understanding that during the fiscal year ending June 30, 1957, they had accepted wagers upon which a ten percent wagering excise was due, and which they were required by law to report and to pay, and that they attempted to evade or defeat the tax, or a portion thereof, by purposely failing to report all of the wagers accepted by them which they knew they had accepted during such fiscal year and which they knew it was their duty to state in their wagering excise tax returns during such year.

Court's Instructions

437 The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the Internal Revenue Code which it was the duty of the defendants to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the wagering excise tax due from the defendants.

You are instructed that, in regard to Counts IV and V of the indictment that the law of the United States provides that "there shall be imposed a special tax of \$50.00 per year to be paid by each person who is * * *" engaged in the business of accepting wagers. And the law further provides that each person who is required to pay that special tax of \$50.00 is required to register his name and place of residence and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf with the Director of the Internal Revenue of the district wherein the person maintains his office or principal place of business.

If you find beyond a reasonable doubt that any time during the fiscal year ending June 30, 1957, that the defendants in the City of East St. Louis, in the Eastern District of Illinois, were engaged in the business of accepting

438 wagers, and that during said period of time any substantial amount of wagers were placed with them,

then I charge you that under the Federal law, said defendants were obligated to make a wagering tax return and to pay to the United States Government an excise tax on wagers equal to ten percent of the amount of all said wagers; and if you find beyond a reasonable doubt that said defendants did during said period of time wilfully attempt to evade and defeat any substantial amount of any

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such wagering tax due and owing by them to the United States, then you may find them guilty as to Count IV. If you do not so find you should find them not guilty as to Count IV.

You are instructed that under the law as in effect at the time of the offenses alleged in Counts IV and V of the indictment, each person who engaged in the business of accepting wagers in respect to any sports event or contest, was required to pay an excise tax equal to ten percent of the gross amount of the wagers accepted by him; that is to say, a ten percent tax was imposed upon the total of all wagers accepted, and whether or not the person accepting the wagers won or lost or had expenses in obtaining such wagers would have no effect upon the amount of tax due.

You are further instructed that at the time of the offenses alleged in the indictment the law required that every person engaged in the business of accepting wagers should register with the District Director of Internal Revenue, in this case at Springfield, Illinois, and furnish to that official the following information:

1. His name and place of residence.
2. Each place of business utilized by him in the business of accepting wagers.
3. The name and place of residence of each person engaged in receiving wagers for him or on his behalf.

In Count V of the indictment the defendants are charged with the violation of Title 18, Section 371, United States Code. This statute provides in part "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each person shall be fined * * * or imprisoned * * *, or both.

In regard to Count V of the indictment, it is not neces-

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sary that each member should have known the exact part which every other member took in the conspiracy. Neither is it necessary that any formal or express contract or agreement be made between them. It is enough that the defendants be shown to have had knowledge that they were assisting in a common and unlawful design. Such knowledge may be inferred from his conduct and the attending circumstances, and if the acts are of a nature to satisfy the jury that he was aware of the fact that the parties

with whom he was acting were engaged in the unlawful activities charged, that is sufficient.

The Court instructs you that Section 325.52 of the Internal Code, Internal Revenue regulations provide in part as follows:

“(a) Upon receipt of a return on Form 11-C, together with remittance of the full amount of tax due, the collector shall issue a special tax stamp as evidence of payment of the special tax. Such payment shall be made only in the form of cash, certified check, cashier's check, or money order.

“(b) Collectors will distinctly write or print on the stamp before it is delivered or mailed to the taxpayer the following information: (1) The taxpayer's registered name, and (2) the business or office address of the taxpayer if he has one; if not, the residence address.”

You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge of things that are out in the open and are obvious to him, and say, “I have no knowledge of those facts.” If a man honestly believes that he has paid all of the taxes he owes he is not guilty of criminal evasion. But if he acts without reasonable ground for belief that his conduct was lawful, it is for you to decide whether he was acting in good faith or whether he intended to evade the tax. This question of intent is a

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question you must determine for yourselves from a consideration of all the evidence.

441 A fraudulent statement is a false statement made by a person knowing at the time it was made that it was false and made with the intent and purpose to deceive and mislead some person.

If you find that there were any wagers accepted by the defendants which were not reported, it makes no difference, as far as the question of taxability is concerned, whether such wagers were lawfully received or unlawfully received, inasmuch as wagers both lawfully received and unlawfully received were taxable and should have been reported.

The Court instructs the jury that if a person is engaged in the business of accepting wagers, and he lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers, then the person who initially accepted the bet and the person to whom the bet was laid off are both liable for the tax on wagers. In order for there to be an intent to evade the tax it is necessary that the defendants knew they were liable for the tax.

The Court instructs the jury that "wilfully" means knowingly, and with a bad heart, and a deliberate intent; it means having the purpose to cheat or defraud or to do a wrong in connection with a tax matter. It is not enough if all that is shown is that the taxpayers were careless, negligent or grossly negligent. They are not wilfully evading a tax if they made errors of law.

There are certain circumstances which you may consider as pointing to whether or not the defendants
442 had the intent to and did attempt to evade or defeat the payment of the excise tax on wagers. If you find beyond a reasonable doubt that they exist in this case and that such conduct on the part of the defendants indicated such intent then you may find the defendants guilty. These are general illustrations:

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Keeping a double set of books;
Making false entries in the books;
Covering up sources of wagers;
Keeping incomplete records of wagers;
Handling one's affairs to avoid the making of usual records;

And any conduct the likelihood of which would be to mislead or conceal.

I give you these instances simply to illustrate the type of conduct from which you may infer intent to evade taxes.

Under our system of laws men are not punished criminally for mere mistakes, mere mismanagement, mere carelessness, or mere errors of judgment. They are punished only for intentional wrongdoing. The defendants here are not on trial for errors of judgment or mistakes or mismanagement, but are on trial for a criminal offense, and an essential element of that offense is wilful or criminal intent, which it is incumbent upon the Government to prove to your satisfaction and beyond a reasonable doubt before you will be warranted in returning a verdict of guilty.

443 The jury is further instructed that any bets received in the form of layoffs are not exempt from the tax and such amounts received must be reported as part of the gross wagers received.

The Court instructs the jury that the fact that defendants have not testified in their own behalf does not create any presumption of guilt against them. The Court further instructs the jury that, under the law, the defendants do not have to prove themselves innocent of the offenses of which they are charged in the indictment; and that in our courts of justice, defendants have the right to stand on the presumption of innocence of the offenses of which they are charged and that they cannot be convicted unless the Government has proven the offenses charged against them beyond a reasonable doubt, as the Court has defined that

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term to you. And the Court further instructs the jury that it must not permit the fact that defendants have not testified in their own behalf to weigh in the slightest degree against the defendants, nor should this fact be permitted to enter into the discussions or deliberations of the jury in any manner.

o The fact that an individuals name is signed to a tax return and such return is filed with the Director of Internal Revenue of the United States is prima facie evidence for all purposes that the tax return was actually signed by him.

444 The Court instructs you that any verdict you render must be unanimous; it must be agreed to by every juror; it is the verdict of each juror as an individual, as well as the jury as a whole; no juror should vote for conviction unless he is convinced in his own mind, beyond a reasonable doubt, that under the evidence and the Court's instructions defendants are guilty; and no juror should vote for acquittal if in his own mind he is convinced, beyond a reasonable doubt, that defendants are guilty.

p It is the duty of each juror to reason with his fellow jurors and to examine the soundness of his conclusions in the light of the reasoning of his fellow jurors, and if after such consideration he is of the opinion that his fellow jurors are correct in their conclusions, he should not hesitate to join in a verdict in accordance therewith.

The Court: I will see counsel and the reporter in chambers.

(The following proceedings were then had out of the presence and hearing of the jury:)

The Court: Are there any objections or exceptions, gentlemen?

Mr. Waller: We object and except to the giving by the Court of the first instruction given by the Court to the jury on the ground that the question as to whether or not

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the matters were material which are contained in the second paragraph of that instruction have not been
445 shown or proven by the evidence and that paragraph of the instructions reads as follows: "In regard to Counts I, II and III of the indictment, you are instructed that whether the statements made by the defendants were material to the matters then being investigated and whether the statements were made in a matter within the jurisdiction of a department or agency of the United States, are both questions of law for the Court." Then, too, the jury had no opportunity to consider it with the statements concerning the representations made by Donald Kastner that he did not know the names or any individuals who were accepting wagers and is not supported by the evidence. There is no proof, your Honor that the statements alleged to have been by these defendants are unequivocal statements made by them. Also, we object and except because there is no testimony to show or facts which are shown that they were within the jurisdiction of the United States and we object and except further because this instruction, when taken as a whole which the Court gave as the first instruction to the jury does not include all of the elements of the offenses as charged against them or that they knowingly and wilfully made these alleged false statements.

We also object and except to the giving of the instruction which reads as follows: "You are further instructed, that, in regard to Counts I, II and III of the indictment, whether the statements were made under oath is of no
446 significance. That the statements were not made under oath has no effect upon the question as to whether or not there was a violation of the statute."

We object and except to the statement that the oath is of no significance and we believe this instruction goes to the question of whether or not the statements were wilfully made, and we think it goes to the intent.

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We object and except to the Court's giving to the jury the following instruction: "Under Count IV of the indictment, the defendants are charged with violation of Title 26, Section 7201 of the United States Code. This statute provides in part that "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, * * *, be guilty of a felony, and, upon conviction thereof, shall be fined * * *, or imprisoned * * *, or both", in that it does not instruct the jury they must find the defendants attempted to evade or defeat a substantial amount of taxes.

We object and except to the giving of the following instruction by the Court: "You are instructed that in regard to Count IV of the indictment, if you find that a fraudulent wagering excise tax return was filed by the defendants with intent to defeat a substantial amount or all of the wagering excise tax during the fiscal year ending June 30, 1957, and that this was done wilfully, the crime is complete as soon as the filing takes place" on the ground that there was no evidence presented to the
447 jury connecting the defendants, Prindable or Kastner with the filing of the federal wagering excise tax return as alleged in the indictment.

We object and except to the giving of this instruction, by the Court: "To establish its case under Count IV of the indictment, the Government must prove beyond a reasonable doubt the following three elements:

1. That during the period charged in the indictment the defendants were engaged in the business of accepting wagers;
2. That substantial excise tax on those wagers was due and owing by them to the United States;
3. That the defendants wilfully attempted to evade and defeat the tax.

The gist of the offense charged in Count IV of the in-

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dictment is wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the Internal Revenue Code. The word 'attempt' as used in this law, involves two things:

1. An intent to evade or defeat the tax; and
2. Some act done in furtherance of such intent.

The word 'attempt' contemplates that the defendants had knowledge and understanding that during the fiscal year ending June 30, 1957, they had accepted wagers upon which a ten percent wagering excise tax was due, and which they were required to report and to pay, and that they attempted to evade or defeat the tax, or a portion thereof, by purposely failing to report all of the
448 wagers accepted by them which they knew they had accepted during such fiscal year and which they knew it was their duty to state in their wagering excise tax returns during such year.

The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the Internal Revenue Code which it was the duty of the defendants to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the wagering excise tax due from the defendants." We object to that instruction on the ground that it does not state they attempted to evade or defeat the tax or a substantial portion thereof but merely tells the jury that it was a violation of law, if they had this knowledge, to evade or defeat the tax or a portion thereof. Also, this instruction refers to all of the defendants and there is no showing by the evidence here that the defendants Prindable or Kastner knew the correct amount of tax due, if there was any additional amount due.

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We also object and except to the giving of the following instruction by the Court:

"You are instructed that, in regard to Counts IV and V of the indictment that the law of the United States provides that 'there shall be imposed a special tax of 449 \$50.00 per year to be paid by each person who is * * * engaged in the business of accepting wagers.

And the law further provides that each person who is required to pay that special tax of \$50.00 is required to register his name and place of residence and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf with the Director of the Internal Revenue of the district wherein the person maintains his office or principal place of business."

We object to that on the ground that there is no showing the defendants did not pay the \$50.00 tax. In fact, all of the evidence shows that they did, in fact, pay the tax. We also object because it is confusing to the jury as to the ten percent and the \$50.00 registration tax, which they were required to pay. We also object for the further reason that the jury is liable to convict on a theory which is not supported by the evidence in any charge in the indictment.

We also object and except to the giving of the following instruction:

"If you find beyond a reasonable doubt that at any time during the fiscal year ending June 30, 1957, that the defendants in the City of East St. Louis, in the Eastern District of Illinois were engaged in the business of accepting wagers, and that during said period of time any substantial amount of wagers were placed with them, then I charge

you that under the Federal law, said defendants 450 were obligated to make a wagering tax return and to pay to the United States Government an excise tax on wagers equal to ten percent of the amount of all

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of said wagers; and if you find beyond a reasonable doubt that said defendants did during said period of time wilfully attempt to evade and defeat any substantial amount of any such wagering tax due and owing by them to the United States, then you may find them guilty as to Count IV. If you do not so find you should find them not guilty as to Count IV." We object to the language "that during said period of time any substantial amount of wagers were placed with them." That could be confusing to the jury on the ground the payment of the bets in a substantial amount, would instruct the jury to find them guilty. We also object, and we think this instruction instructs the jury to find the defendants guilty of a misdemeanor if they failed to file a proper wagering tax return.

We also object and except to the giving of the following instructions:

"You are instructed that under the law as in effect at the time of the offenses alleged in Counts IV and V of the indictment, each person who engaged in the business of accepting wagers in respect to any sports event or contest, was required to pay an excise tax equal to ten percent of the gross amount of the wagers accepted by him; that is to say, a ten percent tax was imposed upon the total of all wagers accepted, and whether or not the person
451 accepting the wagers won or lost or had expenses in obtaining such wagers, would have no effect upon the amount of the tax due."

We object and except to that part of the instruction because it is misleading and leads the jury to believe the defendants were liable for the ten percent of the total amount of wagers accepted by them regardless and without reference to the tax that had already been paid by the individual.

Then, we object and except to the second paragraph of that instruction which reads as follows:

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"You are further instructed that at the time of the offenses alleged in the indictment the law required that every person engaged in the business of accepting wagers should register with the District Director of Internal Revenue, in this case at Springfield, Illinois, and furnish to that official the following information:

1. His name and place of residence.
2. Each place of business utilized by him in the business of accepting wagers.
3. The name and place of residence of each person engaged in receiving wagers for him or on his behalf."

That is misleading because the law provides for the principal place of business in that instruction and there was no valid and legal Internal Revenue regulation in effect at the time alleged in the indictment requiring the defendants to do what is stated they must do in the
452 second paragraph of that instruction. We also object on the ground that it is misleading. The law actually requires the principal place of business be registered and, if none, their residence.

We object and except to the giving of the following instruction by the Court:

"In Count V of the indictment the defendants are charged with the violation of Title 18, Section 371, United States Code. This statute provides in part that 'if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each person shall be fined * * * or imprisoned * * *, or both.' " We object on the ground that the instruction would require the jury to find these defendants guilty of conspiracy regardless of whether they conspired with the other defendants or any other persons.

We object and except to the giving, by the Court, of the following instruction:

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"In regard to Count V of the indictment, it is not necessary that each member should have known the exact part which every other member took in the conspiracy. Neither is it necessary that any formal or express contract or agreement be made between them. It is enough that the defendants be shown to have had knowledge that
453 they were assisting in a common and unlawful design. Such knowledge may be inferred from his conduct and the attending circumstances, and if the acts are of a nature to satisfy the jury that he was aware of the fact that the parties with whom he was acting were engaged in the unlawful activities charged, that is sufficient."

We object and except to the giving of this instruction because it instructs the jury to find the defendants guilty of the charge of violating any law without restriction or restricting it to the violation of the laws alleged in the indictment and it is not restricted to a violation of the sections charged in Count IV, your Honor.

We also object and except to the giving of the following instruction by the Court:

"You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge of things that are out in the open and are obvious to him, and say 'I have no knowledge of those facts.' If a man honestly believes that he has paid all of the taxes he owes, he is not guilty of criminal evasion. But if he acts without reasonable ground for belief that his conduct was lawful, it is for you to decide whether he was acting in good faith or whether he intended to evade the tax. This question of intent is a question you must determine for yourselves from a consideration of all the evidence."

We object to that instruction, your Honor, on the
454 ground it sets good standard as—or sets good faith as the standard and there was an instruction offered

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in which evil intent was stricken by the Court and the word substituted and so we object to that instruction.

We object and except to the giving of the following instruction by the Court:

"There are certain circumstances which you may consider as pointing to whether or not the defendants had the intent to and did attempt to evade or defeat the payment of the excise tax on wagers. If you find beyond a reasonable doubt that they exist in this case and that such conduct on the part of the defendants indicated such intent then you may find the defendants guilty. These are general illustrations:

Keeping a double set of books;

Making false entries in the books;

Covering up sources of wagers;

Keeping incomplete records of wagers;

Handling one's affairs to avoid the making of usual records;

And any conduct the likelihood of which would be to mislead or conceal.

I give you these instances simply to illustrate the type of conduct from which you may infer intent to evade taxes."

We object to that statement on the ground that the statements set up in this instruction as a standard to be considered by the jury is not supported by the evidence and does not contain any statements as to what the jury may consider in opposition of the alleged attempt to evade or defeat the payment of taxes. It also sets up good faith and it is not supported by the evidence.

455 We also object and except to the giving of the following instruction by the Court:

"The jury is further instructed that any bets received in the form of layoffs are not exempt from the tax and such amounts received must be reported as part of the gross wagers received."

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We think that instruction is misleading in that it does not state the tax is payable by the original acceptor of the bet and by inference, it instructs the jury the defendants are liable for the payment of the excise tax although the tax may have been paid by the bettor or paid by the original acceptor of the bet who may have paid the tax to the United States and not claiming any refund for the same. It is merely excerpts of the law and does not contain the whole law covering the facts. I believe that is all of them, your Honor, which we wish to object to.

The Court: The objections will be overruled.

Mr. Waller: Now, if the Court please, we request the Court to give defendant's instructions numbered 3, 6, 8, 9, 15, 16, 19.

The Court: You may hand those to the reporter and he may incorporate them in the record. The request as to all those requested instructions will be denied.

Defendants' Requested Instruction III.

456 You may not find the defendants guilty of wilful attempt to defeat and evade the wagering taxes as charged in the fourth count in this indictment, if you find only that they had wilfully failed to pay the tax on alleged wagers placed with them.

Defendants' Requested Instruction VI.

The Court instructs you that anyone who knowingly and voluntarily cooperates with, aids, assists, advises, or encourages another in the commission of a crime is an accomplice regardless of the degree of his guilt.

Defendants' Requested Instruction VIII.

You are instructed that in order to find that the defendants made false statements to Internal Revenue Agents as

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charged in the indictment, you must find that the defendants did in fact have other agents other than Charles Kastner and Malcom Wagstaff. You must find that these statements were made wilfully and knowingly, and that the statements were in fact false, fictitious and fraudulent, and that it was a representation of a material fact. In determining whether or not persons other than Charles Kastner and Malcom Wagstaff were agents, you are instructed that you must find beyond a reasonable doubt that the North Sales Company had the right to control the manner and method of the activities being performed by these persons and it is not sufficient for you to find the
 457 defendants guilty merely by finding that there was a business relationship between the defendants and said persons.

Defendants' Requested Instruction IX.

The Court instructs the jury that if a person is engaged in the business of accepting wagers, and he lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers, he shall nonetheless be liable for the tax on the wagers or contributions initially accepted by him.

Defendants' Requested Instruction XV.

If in the course of these instructions, and if during this trial, the Court has said or shall say anything that indicates to you how the Court might feel or how you think the Court feels with respect to the testimony in this case, and that opinion is different from your opinion of the testimony, you are to accept your opinion of the testimony rather than the Court's, because it is your sole province to pass on the testimony, and from the testimony you pass upon the credibility of the witnesses, and with that the

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Court has nothing to do, just as you as members of the jury have nothing to do with determining what the law in this case is.

Defendants' Requested Instruction XVI.

458 The defendants are presumed to be innocent and the burden is upon the Government to prove the guilt of the defendants beyond a reasonable doubt. The presumption of innocence is described as a substantial right which the law affords to the defendants and it follows the defendants throughout this trial and entitles them to an acquittal at your hands unless their guilt has been proven to your satisfaction and beyond a reasonable doubt. If upon consideration of the evidence there is a reasonable doubt of the guilt of the defendants remaining, the accused are entitled to the proof of that doubt by an acquittal, for it is not sufficient to establish a probability of guilt, but the evidence must establish the truth of the charge to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of the jurors who are bound to act conscientiously upon it.

Defendants' Requested Instruction XIX.

The Court instructs the jury that even if you find and believe from the evidence that defendants made the statements alleged under Counts I, II and III of the indictment, and if you find and believe that defendants understood the word "agent" and "employee" to only include Charles Kastner and Malcom Wagstaff, and not to include any tavern operators who transmitted bets to them, then
459 it is your duty to acquit such defendant or defendants.

Mr. O'Connell: The defendants object to the forms of verdicts to be given by the Court on the ground that they

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have contained in them the word "guilty" and "not guilty" in the same form and we think on the other counts, the verdicts should be set forth in a separate form of instruction on the verdicts.

The Court: Very well. We will go back in the court room and I will instruct the jury further as to their verdicts.

(The following proceedings were then had in the presence and hearing of the jury:)

The Court: Ladies and gentlemen of the jury, you have nothing to do with the fixing of the punishment if you should find these defendants, or any of them guilty. Your duty is to find the facts and to say whether or not these defendants, or any of them are guilty or not guilty. If any or all of them should be found guilty by you, the punishment will be determined by the Court.

The Court will now herewith give your forms of verdict. You have three forms of verdict. If you find the defendant Thomas D. Clancy guilty on any or all of the counts in which he is charged, then the form of your verdict may be:

"We, the jury, find the defendant, Thomas D. Clancy, guilty on Counts,,, as charged in the indictment.

"We, the jury, find the defendant, Thomas D. Clancy, 460 not guilty on Counts,,, as charged in the indictment." In the blank spaces, you will insert the count or counts on which you find him guilty if you do so find him guilty as charged in the indictment. Or, if you find him not guilty on some or all of the Counts in which he is charged, you will insert the Counts in the verdict, according to your verdict.

If you find the defendant Donald Kastner guilty in any of the Counts in which he is charged, you may return the following form of verdict:

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"We, the jury, find the defendant, Donald Kastner guilty on, Counts" then there are the blank spaces which you may fill in if you so find either one or all of the Counts in which he is charged and which you find him guilty.

If you find the defendant, Donald Kastner not guilty on one or more of the counts, then the form of your verdict may be:

"We, the jury, find the defendant Donald Kastner not guilty in Counts,, " then there are the blank spaces to be filled in for a finding on any one or all of the counts.

If you find the defendant James F. Prindable guilty on any one or more of the Counts, or all of them in which he is charged, the form of your verdict may be:

"We, the jury, find the defendant, James F. Prindable, guilty on counts,,, " again,
461 there are three blank spaces to fill in for one or more of the counts in which he is named and charged.

If you find him not guilty on one or more or all of the counts of the indictment in which he is charged, the form of your verdict may be:

"We, the jury, find the defendant, James F. Prindable, not guilty on counts,,, as charged in the indictment." And there are three blank spaces you will fill in as to the Counts, one or more, in which he is charged.

After you retire to your jury room, you will select from among your own number a foreman. After you have deliberated and have arrived at a verdict or verdicts you will fill in the blank spaces in the verdicts, and return them into open court. When you have arrived at your verdicts, the foreman will sign on the line indicated for his signature and the remaining 11 jurors will sign on the remaining 11 lines.

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462 The Court: Ladies and gentlemen, have you arrived at your verdicts?

The Foreman: We have, your Honor.

The Court: May I have them, please?

463 (Same handed to the Court by the foreman.)

The Court: Mr. Clerk, will you read the verdicts, please?

(At which time, the Clerk reads the verdicts which were as follows:)

"We, the jury, find the defendant, Thomas D. Clancy, guilty on Counts 1, 4 and 5 as charged in the indictment;" and "We, the jury, find the defendant, Thomas D. Clancy, not guilty as charged in . . . , . . . , as charged in the indictment."

"We, the jury, find the defendant, James F. Prindable, guilty as charged in Counts 3, 4 and 5 as charged in the indictment," and "We, the jury, find the defendant, James F. Prindable, not guilty on Counts as charged in the indictments."

"We, the jury, find the defendant, Donald Kastner, guilty on Counts 4 and 5 as charged in the indictment," and "We, the jury, find the defendant, Donald Kastner, not guilty on Counts 2, as charged in the indictment."

The Court: Are those your verdicts, ladies and gentlemen of the jury?

The Jurors: Yes, sir.

The Court: Does the defendants care to poll the jury?

Mr. O'Connell: Yes, your Honor.

The Court: Mr. Clerk, will you poll the jurors?

The Clerk: Mr. Clinton Beimfohr, was this and is this now your verdict?

464 Mr. Clinton Beimfohr: It is.

The Clerk: Mr. Walter Bernhardt, was this and is this now your verdict?

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Mr. Walter Bernhardt: It is.

The Clerk: Mr. Edward C. Heil, was this and is this now your verdict?

Mr. Edward C. Heil: It is.

The Clerk: Helen Pearce, was this and is this now your verdict?

Helen Pearce: It is.

The Clerk: Grace N. Scott, was this and is this now your verdict?

Grace N. Scott: It is.

The Clerk: Eve Hafeli, was this and is this now your verdict?

Eve Hafeli: It is.

The Clerk: Harold H. Runge, was this and is this now your verdict?

Harold H. Runge: It is.

The Clerk: Charles St. Clair, was this and is this now your verdict?

Charles St. Clair: It is.

The Clerk: Claude B. Haynes, was this and is this now your verdict?

Claude B. Haynes: It is.

465 The Clerk: Delbert Mueller, was this and is this now your verdict?

Delbert Mueller: It is.

The Clerk: Harry H. O'Connell, was this and is this now your verdict?

Harry H. O'Connell: It is.

The Clerk: Helen Hayden, was this and is this now your verdict?

Helen Hayden: It is.

Defendants' Offer of Proof

466 (Now, on this 12th day of June, 1959, further proceedings were had in this case, as follows:) **A**

DEFENDANTS' OFFER OF PROOF.

Mr. Waller: We wish to offer the evidence and exhibits in support of the motion in the case of the United States v. Sam G. Magin and we ask that we be given additional time to file our motion for new trial on the basis of newly discovered evidence, your Honor.

Mr. McKnelly: We object to that, your Honor. The point for hearing has been passed upon and it is now too late.

Mr. Waller: I think it would be proper for us to call or to recall Mr. Carter who testified in that matter on the motion to dismiss and ask him the same questions that were propounded by Mr. Foreman.

Mr. Raemer: That motion was ruled upon before trial. They did not see fit at that time to go any further into it at that time as to the affidavit of Carter, your Honor.

The Court: The motion was decided on the position and basis of the motion before the Court at that time and the decision was made. The Court decided the matter at that time and the motion at this time comes too late and the Court will overrule and deny the motion.

Mr. Waller: May we have leave to file our motion on the basis of newly discovered evidence, your Honor?

The Court: On your motion of newly discovered evidence, I don't see how you can say it is newly discovered evidence. I don't know how you can conscientiously
467 say it is newly discovered evidence.

Mr. Waller: May we have 20 days to do that?

The Court: This is the first knowledge this matter of Clancy, Prindable and Kastner was set for this morning. I had no knowledge the matter was set this morning and as far as the Court is concerned, it is not set.

Defendants' Offer of Proof

Mr. Waller: We have subpoenaed one witness from Mt. Vernon if the Court would hear that testimony. It is a matter of avoiding to have to bring her back to East St. Louis.

The Court: What's the testimony about?

Mr. Waller: It is concerned with the improper activity of a juror. We have information that one of the jurors who served as a juror and sat on the trial of this case, stated privately prior to the time he was interrogated on his voir dire examination that he was personally prejudiced against anyone accepting wagers and upon questioning on his voir dire, he answered that question in the negative by stating he did not. We have two witnesses, one a lady to whom he made the statement, the second, to another member of the jury who heard her make the statement to the second juror and the statement was made in his presence, as we understand. We think on that basis there is grounds for a new trial. A person, when they become a prospective juror is required to answer questions on voir dire honestly and if he does not, that is certainly grounds for a new trial, we think.

468 Mr. Raemer: At the time of the voir dire examination, one of the defendants' counsel requested that the Court ask the jurors if they taught Sunday School and whether they had any prejudice against gambling and each of the jurors that sat on this panel that tried this case stated they had no prejudice against gambling. Now, to come in and attack the jury on the basis of what somebody says he heard a juror say, that he had a prejudice against gambling is not well taken. How are you going to prove the jury had a prejudice?

Mr. Waller: Because he admitted it to the juror we wish to produce to testify about it.

The Court: The only statement made under oath was that the jurors had no prejudice against gambling. What is your citation, Mr. Waller?

Vera Simmons

Mr. Waller: 100 Fed. 2nd, at 716; your Honor.

The Court: The Court will review the matter and your authorities and pass on the motion later.

(Now, on this 19th day of June, 1959, this cause coming on for further hearing, the following proceedings were had:)

Mr. Waller: Has your Honor ruled on the question of whether or not the Court will hear evidence concerning the point raised?

The Court: Yes, the Court will hear your evidence.

Mr. Waller: Then, shall we proceed?

The Court: Yes, but first are the defendants in court, counsel?

Mr. Waller: Yes, your Honor.

469 Mr. Waller: The motion for new trial is based on the 47th paragraph of our motion, your Honor, and I will read it to the Court.

"That it has come to the attention of the attorneys for the defendants that one of the jurors selected in this cause admitted prior to his examination on voir dire that he was personally prejudiced against anyone accepting wagers, but testified during voir dire examination by this Honorable Court he was not prejudiced against anyone accepting wagers."

We will call Mrs. Vera Simmons, your Honor.

VERA SIMMONS

was then called as a witness in support of the motion, and being first duly sworn, testified as follows:

Direct Examination, by Mr. Waller.

Q. Will you state your name, please?

A. Vera Simmons.

Q. That's Mrs. Vera L. Simmons?

A. Vera Simmons.

Vera Simmons

Q. Where do you reside, Mrs. Simmons?

A. 428 South 18th Street, Mt. Vernon, Illinois.

Q. How long have you lived there?

A. Twenty-four years as of November, 1959.

470 Q. You are appearing here this morning in response to a subpoena served upon you?

A. Yes, sir, I have it here.

Q. Mrs. Simmons, you are the same Vera L. Simmons who was called as a prospective juror in the case of the United States versus Clancy, Prindable and Kastner, are you not?

A. I am the Vera Simmons called in that case.

Q. Vera L. is not your name?

A. No, sir.

Q. But you are the same person who was called as a prospective juror in that case?

A. Yes, sir.

Q. And you were on the panel of jurors selected for the trial of that case?

A. Yes, sir.

Q. That was on the 11th of May of this year, was it not?

A. Yes, sir.

Q. Mrs. Simmons, if I may refresh your memory, when you were called to the jury box as a prospective juror, you sat in the second last seat in the rear of the jury box, did you not?

A. I don't remember where I sat in the box.

Q. You were in the second row, were you not?

A. I believe I was but I can't remember the position I had in that row.

Q. Mrs. Simmons, when you were called as a juror
471 and were questioned by His Honor, Judge Juergens —you were questioned by His Honor, Judge Juergens, were you not?

A. Yes, sir.

Vera Simmons

Q. You admitted very honestly and very frankly that you were personally prejudiced against anyone accepting wagers, did you not?

A. Yes, sir.

Q. After you admitted that, you sat down, did you not, or were seated?

A. I don't believe I was, I am not sure.

Q. On either side of you in the jury box, were men, is that not correct, in the jury box?

A. To the best of my recollection.

Q. After you made the statement to his Honor, Judge Juergens that you were personally prejudiced against anyone accepting wagers, did you hear one of the other jurors make any statement in that regard?

Mr. Raemer: We object to that. That's not the fact I don't think. Certainly not all of the facts.

The Court: Let her tell what was said, if anything.

Mr. Waller: If it is not a fact, she can certainly state it was not a fact.

The Court: Proceed but avoid leading questions. Let the witness tell what the situation is.

Mr. Waller: In an instance of this sort in offering proof of statements made, it might be one the Court could
472 grant leave to us and we would like to treat this witness as a witness of the Court instead of our witness.

The Court: At this time, you may proceed.

Q. (Mr. Waller Continuing) After making this statement to the Court on that occasion, please tell the Court what statement was made to you by a man on either side of you?

A. This man just made the remark he had the same feeling that I had.

Q. That was after you had made the statement about your feeling and your prejudice toward anyone accepting wagers, was it not?

Vera Simmons

A. Will you please state that again?

Q. That was after you made the statement that you were personally prejudiced against anyone accepting wagers?

A. Yes, sir.

Q. Mrs. Simmons, as a result of the statement made by you, you were excused by his Honor, Judge Juergens, were you not?

A. I was excused.

Q. Mrs. Simmons, as I understand your testimony, you recall sitting in the back row but you don't recall which seat it was, or where it was?

A. No, I don't.

Q. But there was a man sitting on either side of you to the best of your recollection?

A. Yes, sir.

Q. For the purpose of refreshing your recollection, 473 isn't this the seat in which you sat? (Indicating seat in jury box.)

A. I don't remember which seat I was sitting in.

Q. The statement made to you was made by a man sitting on one side or the other of you, but you don't recall which side it was?

A. No, I don't.

Q. But the statement was made by someone sitting on one side of you, but you don't recall which side?

A. Yes, sir.

Mr. Waller: That's all.

Cross-Examination, by Mr. McKnelly.

Q. Did you know the gentleman that made the statement?

A. No, sir.

Q. You don't know his name?

A. No, sir.

Q. Do you know whether that gentleman actually sat on the jury that tried the case?

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A. No, I don't.

Mr. McKnelly: That is all. Witness excused.

Mr. Waller: I would like to take the stand and testify your Honor as to the fact—

The Court: As an attorney in the case?

474 Mr. Waller: No, sir, as to the location in regard to the jurors in the box and—

The Court: You are an attorney?

Mr. Waller: Yes, sir.

The Court: You know the rules and what they are. The request will be denied.

Mr. Waller: May I go over my case and my notes and if the Court doesn't think I should testify and stay in the case, I may have to withdraw from the case. We have asked the Government to stipulate to that.

Mr. McKnelly: We object to that, your Honor.

The Court: Proceed.

Mr. Waller: We would like to request permission of the Court to include the testimony of Mr. Reed and Mr. Carter in this matter. Otherwise, we will call them and be required to ask them the same questions. It will save a lot of time.

Mr. McKnelly: The defendants have waived their right to produce any testimony on this point. Prior to trial this matter was ruled upon and it is too late now.

The Court: The Court has ruled on those questions and the request will be denied.

Mr. Waller: May we then make an offer of proof of the testimony of Mr. Reed and Mr. Carter when they testified concerning the selection of the jury in the case of United States vs. Magin?

475 The Court: You may do that, but for your information I might tell you that the Court has denied Mr. Magin's request as of yesterday and has held that the jury was properly selected in accordance with the law

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and the statutes of the United States and the ruling would be the same in your case as in the Magin case.

Mr. Waller: We ask that their testimony be included in the record in this case, your Honor.

The Court: You may make your offer of proof so it will be in your record in the case, but it will be denied.

Mr. O'Connell: We would like to make an offer of proof, your Honor, which consists of the testimony of Mr. Reed, the Clerk of the United States District Court for the Eastern District of Illinois, and Mr. Bolen Carter, the jury commissioner for this court.

The Court: Proceed and make your offer of proof. Let the record show this offer is being made subsequent to the trial of the case and subsequent to the verdict being returned by the jury and is being made during the time of the argument of the motion for new trial for the first time.

Mr. O'Connell: The offer of proof is that if Mr. Douglas H. Reed, Clerk of this court, were called he would testify as to the manner of selecting the grand jurors here was as he testified in the course of his examination in the case of the United States versus Sam George Magin. We also offer, as a part of the offer of proof, and introduce as a part of our offer, the testimony of Mr. Bolen J. Carter, Jury
476 Commissioner, as he testified in said hearing. We would like to make as a part of our offer of proof and have incorporated as a part of this record the verdict of the jury and the names of those who served on the jury.

The Court: That is a part of the court's record.

Mr. O'Connell: We would like to call Mr. Paul Waller to the stand. Are you not permitting Mr. Waller to testify while he is an attorney in this case?

The Court: That is correct.

Mr. O'Connell: Did the Court state some rule of this Court governing that situation?

The Court: I didn't state a rule that prohibits an attorney testifying while he is in the case.

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Mr. O'Connell: Would the Court look upon it with disfavor?

The Court: That's correct. The court very definitely would look upon it with disfavor.

Mr. O'Connell: We would like to make an offer of proof if he were permitted to testify what he would testify to.

The Court: Are you withdrawing from the case, Mr. Waller?

Mr. Waller: No, your Honor.

The Court: Let the record show the attorney is not withdrawing from the case. Is that correct?

Mr. Waller: Yes, your Honor, but we would offer to prove if my testimony were allowed——

477 The Court: Excuse me a minute, Mr. O'Connell, do.

I understand that in making your offer of proof here as to what Mr. Reed, the clerk, and Mr. Carter, the jury commissioner, if permitted to testify, would be different than what it was last week in the case of the United States versus Sam Magin, Number 18673?

Mr. O'Connell: Oh, no, of course not.

The Court: That's all I wanted to know. Proceed.

Mr. Waller: We would offer to prove by my testimony——

→ The Court: Let the record show you are still the attorney in this case, and not withdrawing.

Mr. Waller: Yes, your Honor. We would offer to prove by my testimony if the Court would allow me to testify, that I was present during the complete interrogation by the Court of the voir dire examination of Mrs. Vera Simmons and that I saw the jurors sitting to the right and to the left of Mrs. Simmons; that I have their names recorded in the notes here which I took at the trial; that according to my notes and my recollection that there was one man to the right and one to the left of Mrs. Simmons from the time she was called and sat in the jury box until

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the time she was excused by the Court; that at all times during the questions on voir dire examination, there was sitting to her right, Albert Mueller of Waterloo, Illinois and during all the time she was seated in the jury box, there was seated to her left Clinton Beinfohr and further,

that when both Mueller and Beinfohr, when asked
478 by this Court as to whether or not they had any prejudice against anyone accepting wagers, answered the Court that they did not and further, that Albert Mueller and Clinton Beinfohr both were accepted on those representations as jurors in this case and did serve as members of the petit jury which considered the evidence and found a verdict of guilty as to the defendants in this case. Further, that Clinton Beinfohr served as the foreman of that jury.

Mr. O'Connell: I would like, as a part of my offer of proof, to have the record show the testimony of Mr. Reed and Mr. Carter given in the Magin case so there won't be any discrepancy and so I will not be misquoting anybody or the evidence of these two gentlemen, or so I am not trying to put words in Mr. Reed's mouth which he didn't say and I would like to use what he did say, together with Mr. Carter as appears from the transcript of Mr. Elliott, when it is transcribed, as my offer of proof and let the Court determine it, whether right or wrong, on the basis of that. I fear my notes are wrong in many instances. I don't have the counties spelled right, some of them and my offer of proof would consist of what went into the record here when these two gentlemen testified. I am not attempting to deceive the Court so I offer what Mr. Reed stated and what Mr. Carter stated as my offer of proof, together with whatever exhibits were used during their testimony. That is my offer of proof, your Honor.

Mr. Raemer: That is an attempt to put into this record the testimony in the Magin case. It has been denied twice

Douglas H. Reed

and now they are back here making an offer of proof
479 in an attempt to get some testimony in that's been
denied on two separate occasions.

The Court: The Court is denying it but they are making their offer of proof which they have a right to do.

Mr. O'Connell: I don't want to be in the position of making the offer of proof of something entirely different than what the offer of proof states and what the record will show, your Honor. When Mr. Elliott types the record, it will be there and that will be our offer of proof and then I won't be misquoting Mr. Reed or Mr. Carter.

The Court: I am not going to order Mr. Elliott to transcribe that testimony in the Magin case. If you wish it, you will have to make arrangements with him and pay for the transcript.

Mr. O'Connell: Oh, of course we will, your Honor.
480 (Note: Testimony of Douglas H. Reed and Bolen
Carter, witnesses in the motion to dismiss the case
of United States of America v. Sam George Magin, Criminal Number 18673, same having been introduced by defendants in the instant case as an offer of proof in motion for new trial, said testimony having been taken on June 12, 1959.)

Testimony of Douglas H. Reed.

DOUGLAS H. REED,

called as a witness by the defendant (Magin) in support of his motion to dismiss the case against him, being first duly sworn, testified as follows:

Direct Examination, by Mr. Foreman.

My name is Douglas H. Reed, and I have been for some thirty years last past the Clerk of the United States District Court for the Eastern District of Illinois, and as such

Douglas H. Reed

481 Clerk in conjunction with the Jury Commissioner appointed by the Court, I have been in charge of the drawing of jurors, both Grand and Petit; attached to the Affidavit filed by me in the case of United States versus Sam George Magin, Criminal Number 18673, is a form of questionnaire of the type sent to most of the prospective jurors; the form of the questionnaire attached to my Affidavit is the only one sent to prospective jurors, and there is no other type or form sent; in addition to the names of persons to whom the questionnaire was sent, names were procured by me and the Jury Commissioner, in one way or another through the solicitation from organizations by questionnaires or letters being sent to individuals or organizations as to prospective jurors; they were sent to individual parties mostly and were not necessarily limited to organizations; upon the return of the questionnaire sent to the prospective jurors, I examined them and they were filed in my office where I main-
482 tained them on file; I wouldn't say that I never examined them in conjunction with the Jury Commissioner; they were available to the Jury Commissioner; I think sometimes I actually examined these in conjunction with the Jury Commissioner; I know there have been times that we have looked at them together.

Q. After the examination which you made of the questionnaires, you would come to the conclusion they were or were not qualified jurors, is that correct, Mr. Reed? From the questionnaires, whether they were or were not qualified jurors?

A. I don't know what you mean by qualified jurors. It they said they had a heart attack or were incapacitated, or had something wrong with them physically, with their personal well being, or were not physically able, or listed himself as a doctor's patient, or if they claimed exemption, if his occupation was such that we knew, under the law

Douglas H. Reed

caused him to be exempt under the law, we, of course, knew he had to be excused and in that event, we didn't make a card on him.

483 After examining the questionnaire, I would determine under our system whether I thought the man was qualified or not to serve as a juror; after I deemed them to be qualified, I prepared a card and that card was placed in the jury box at the same time; from time to time I and the Jury Commissioner placed these in the box.

Q. As I understand it, you placed some additional names obtained from persons whose opinion you respected to advise as to certain persons in their communities that would be qualified jurors.

A. The same procedure is followed; We accept some that we don't send questionnaires.

I do not send questionnaires to some of the names given to me by persons whose opinions I respect, and I prepare those cards on the basis of the statements made to me by the person submitting the names.

Q. Do you have an opinion as to how many such names were placed in the jury box from time to time?

A. I do not.

Q. Or what proportion of the jurors would be so placed?

484 A. No, but not a great deal, not a great number.

I stated in my Affidavit as of March 29, 1954, that I counted the names in the jury box and at that time, there were 554 names and addresses in the box; that box contains the names of all of the jurors in the Eastern District of Illinois; since that time, I have made another count on May 11, 1959, and at that time there were 617 in the box, and I made a computation with respect to the total number of jurors taken from the box since March 29, 1954 to May 11, 1959, and I have made a computation with respect to the total number of jurors in the box subsequent to March

Douglas H. Reed

29, 1954, and that total was 1,620; during the intervening period, I have added names of prospective jurors obtained as I have previously stated. I do not maintain a card index system by means of which I can determine from time to time, without actually counting the names of the jurors in the box, how many jurors are in the box. I do not maintain a record of how many names I had from time to time and the dates when such names were added.

Q. During the intervening period from March 29, 1954, to May 11, 1959, there would be no way of determining how many names were actually in the box, would there?

A. Yes. Take the number in the box of the actual count of March 29, 1954, and the number in the box on May 11, 1959, and the figures would show you how many would be drawn out from the count, or added.

Q. I don't know that I understand you, you had some 1,620 names and added some, during the same period, some that brought the total to 1,683 names.

A. That's right.

Q. You don't know when the names were added?

A. No, I can't tell you that. I didn't keep a record of when they were added.

Q. There was no way to determine the number of jurors in the box from time to time during that intervening period, was there?

A. I counted the number in the box two or three times a year. Maybe not counted every card, but counted 100 or 200 out and I am saying to you there has always been more than 300.

Q. You have never done that in conjunction with the Jury Commissioner, have you?

A. It seems to me he has been there once or twice. Maybe not too long ago.

Q. He hasn't been there recently, has he?

Douglas H. Reed.

A. I have done it myself mostly. I stated in my affidavit that until July 23, 1956, there had been removed approximately 815 names and addresses by me and Bolen Carter, but I have no record of how many names were put in there from time to time; as of July 23, 1956, I have no way of determining the exact number of names in the box except I say there were more than 300.

487 Q. You have no record to substantiate it, do you, only that you know the record contains a substantial number of cards in the box at that time, isn't that right?

A. No, again I say I counted them two or three times a year and that's how I know there are always more than 300 in there; that's what I am testifying to.

On July 23, 1956, I received an order from the Judge of this court with respect to the drawing of a Grand Jury to be held and convened on August 7, 1956; the document marked Defendants' Exhibit 1 is the photostatic copy of that order; I drew a panel in conjunction with that order following the order. Defendants' Exhibit 1-A is

488. that panel that was drawn. From an examination of this document, I can't tell you from my personal knowledge how I learned C. Loos was to be correctly designated as Janet C. Loas. The street appears to be changed, the address to 202 West Hood, Sparta, but one of my deputies probably could. It only shows here she resided at Carbondale and that she had moved to the new address. No doubt there is a letter that was furnished to her when she reported it. She subsequently changed her address and it was changed. I would not know why Rose Batey's name appears crossed out. How it occurred that the person shown as Mrs. June Kahn and the June is crossed out and the word, "Ellen" added, 9780 Lincoln Trail, East St. Louis, and the East St. Louis is crossed out and changed to Caseyville, is that she probably had moved by the time I got her address and when her notice

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came in, it was this address. I wouldn't know why the name Ralph Thaxton has been crossed out and the address of 910 S. Madison Street, Marion. He had been excused by the Judge, I suppose, but I do not know. The
489 reason for the changed address of Bernadine War-
ran from 11304 North Street to 713 North 10th Street, Mt. Vernon, I can only say it is quite possible when she came in, we probably changed it to the 10th Street address. It is possible it was changed to that address after she came in. I do not know why Sophia Derter, 343 Locust Street, Columbia, Illinois, is shown crossed out. I assume she was excused by the court. I believe that the writing beside the name of Delia M. Simms is the word deceased. I didn't do the writing there. I assume one of the deputies ascertained that information. I don't know why the name of Donald W. Casper, Route 3, Cobden, is crossed out. The party whose first name I
490 can't make out, but whose last name is Westfall at 401 Southgate, Belleville, this shows that party was excused. I don't know exactly why the names H. Don Ostrich, 503 Morgan Street; Anna, and Hilda Hogan, Catherine Drive, Caseyville; and Thomas E. Madra, 310 North Second Street, Mounds, are crossed out. The reason for crossing them out would be on the order of the court. I don't have that authority.

Q. It wouldn't be because you had determined those people were no longer residents in this district?

A. Even so, the Clerk has no power to excuse a juror.

Q. These persons may not have resided in the district, and you crossed them off?

A. If they had moved out of the district, we probably would have crossed them off after conferring with the Judge, telling him they had moved out of the district.

I have never been asked by this court if I main-
491 tained a separate jury box for Danville, East St. Louis and Cairo. It has been a practice for a num-

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ber of years to receive from time to time, in fact, almost always, an order authorizing me to draw juries from a distance of 150 miles from the place of holding court. I have examined the various orders for drawing juries from 1954 to the present time.

Q. All of these with the exception of the present order do not provide for drawing juries within 150 miles from the place of holding court?

A. I don't know, but I think in October, October 21, 1955, there was an order to draw a jury with no limitations and Judge Juergens signed an order, I believe it was in July to draw a jury with no limitations and back before that, Judge Wham, I think, signed an order without any limitation.

I think there are more than two, but I don't know.
492 Since 1954, I am not sure about it. I am acquainted with the qualifications of jurors in the Federal court. A person who has been convicted in a State or Federal Court of a crime, the punishment of which would be imprisonment for more than one year, would not be a qualified juror unless his civil rights had been restored. In the questionnaire which I have submitted, in connection with my affidavit, there is no portion which requests information to determine if the person to whom I am sending the questionnaire has ever been convicted of a crime in the Federal or State court, the punishment of which would be imprisonment for one year or more, and in which their civil rights had not been restored. . . .

493 Q. Defendant's Exhibit 2, being an official highway
496 map for the year 1957, containing the outline of the various counties of the State of Illinois, together with the names of the various municipalities, cities and villages, upon which has been delineated, in pencil, the Eastern District of Illinois and showing the outline of the various Counties within the Eastern District of Illi-

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nois in which, and from which the jurors drawn for the panel for grand jury service, and ordered to be drawn July 23, 1956, in which are shown the figures in circles, being the number of jurors dismissed or not used with the exception of those in St. Clair County in which the number drawn was 7 and the number used was 4; Monroe County had 2 drawn and the number used was 1. Would you examine that, please, together with the statement of the jurors which you have previously testified to and state whether that correctly represents those facts and figures?

A. It would require some time to check these. I don't get your question anyway, Mr. Foreman. What do you want me to do now?

Q. Merely see whether the number of jurors shown in there in the various counties and the various counties shown on the map, whether those numbers represent the number of jurors as shown as listed on your list and were the number of jurors reporting in East St. Louis area?

A. I couldn't answer that question until I have 497 counted them, and to count them, it would require some time. This one is from Sparta and this is Randolph County, that's 1. Hamilton County, there is 1. Jackson, that would be two in Jackson, wouldn't it?

Q. That's what the map shows, I believe.

A. One from Hamilton, one from Wayne, Shelby County, 1, no, two from Shelby County. St. Clair County, 1, 2, 3, 4, 5, 6, 7, from St. Clair County, Randolph County 1, Williamson County 1, one from Marion County, one from Jefferson County, two from Clay County, Washington 1, Monroe two; Alexander one, Perry one, Union 2, Saline one, Effingham County one; Fayette one, Pulaski one.

Q. That's a total of 30 jurors drawn. How many were used?

A. I can't tell you definitely without my records. This would indicate that there were 22 used, but I am not testifying to that without going to my records.

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Q. The exception possibly might be some change here shown in Exhibit 3-A as reflected on the map the number of jurors drawn would be in the figures, the figures in the counties placed on Exhibit 2?

A. I think that's right, that could be.

I have recently made a check of the cards under date of May 26, 1959, the cards in the general jury box containing the names of these jurors in the several
498 counties in the Eastern District of Illinois. I do not have them with me, it is in my office. On May 26, 1959, the number of the jurors and the name of the counties in the jury box was as follows: Alexander
499 County 21; Champaign County, 28; Coles County, 14; Clark County, 16; Clay County, 14; Clinton County, 19; Crawford, 9; Cumberland, 14; Douglas, 9; Edgar, 14; Edwards, 9; Effingham, 22; Fayette, 26; Ford, 12; Franklin, 11; Gallatin, 6; Hamilton, 10; Hardin, 4; Iroquois, 22; Jackson, 10; Jasper, 6; Jefferson, 12; Johnson, 14; Kankakee, 6; Lawrence, 5; Marion, 22; Massac, 5; Monroe, 25; Moultrie, 5; Perry, 17; Piatt, 12; Pope, 1; Pulaski, 14; Randolph, 4; Richland, 16; St. Clair, 45; Saline, 8; Shelby, 10; Union, 15; Vermillion, 37; Wabash, 3; Washington, 22; Wayne, 18; White, 8; and Williamson, 21.

There probably would be some variance between the ratio of jurors which was found to exist in the jury box on May 26, 1959, and what was in the box pursuant to the order of July 23, 1956. There has been no attempt made by the Jury Commissionner or myself to segregate completely the number of cards containing the names
500 of prospective jurors in the area from which we proposed to draw them as distinguished from the entire district. The selection with respect to a territorial drawing is made by virtue of taking cards out of the box and separating them from cards within the territorial area, and excluding those out of the area in compliance

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with the court order. We take the cards out of the general box and separate them by name and the names that we are able to determine are within the territorial limits of the order, we put on one side, and take the others and lay them on the other side, until we get enough cards on the table to make up the jury panel, putting the rest of the names back in the box for future drawing. The

501 names might go back in the box from time to time as I have had a number of jurors who might serve more than one time in this court. After the names are used they are marked and put in the file. Sometime later, there might be a request for names and some of the same names might come in again. If the questionnaire

502 shows they have served within a year, we don't make up a card. At no time during the drawing of any jury, which the court ordered or which the court provided for that might be drawn within a radius of 150 miles of the place of holding court, did we take the names within the radius and then put them in a separate box and have a separate drawing. At no time did we determine that there was 300 qualified jurors in the 150 mile radius. And with respect to the number of jurors on hand on July 23, 1956, we followed the same procedure that we followed with respect to the prior and subsequent drawing of jurors which we felt were within the territorial limits of approximately 150 miles.

Cross-Examination, by Mr. McKnelly.

503 On July 23, 1956, we drew the jurors from the en-
504 tire district. When the cards came in and were
made up by the deputies, Mr. Carter comes in, we divide the cards up, I take half and he takes half, and we alternately put the cards in the box.

Bolen J. Carter

Redirect Examination, by Mr. Foreman.

509 When we drew the names, Mr. Carter would be on
his side and I would be on my side. I never saw Mr.
Carter's cards and he never saw my cards. We didn't
exchange them. He sometimes asked me if that was in
the 150 mile limit and we would discuss it. We did
512 not cross check each other. I made no specific
count of the jurors in the jury box in the last five
years, other than March 29, 1954 and May 11, 1959. I have
no record of having made any other counts.

Testimony of Bolen J. Carter.

BOLEN J. CARTER

was then called as a witness for the Defendant herein,
and being first duly sworn, testified as follows:

Direct Examination, by Mr. Foreman.

My name is Bolen J. Carter and I am Jury Commissioner
for the United States District Court for the Eastern
513 District of Illinois, and have been for some twelve
years last past. I am familiar with the type of
questionnaire sent out to prospective jurors. I never ex-
amined these questionnaires when returned for the pur-
pose of determining whether these persons were or were
not qualified. I did not know until recently that the
Clerk would make up cards from persons from whom he
had never received a questionnaire. In the Affidavit that
I made, I said around 50 or 60 miles, actually it
514 was closer to 100 to 125 miles, is the area from
which we would select the jurors. We never used
a mileage chart or map, we merely approximated the area.
When these jurors would be drawn, we would each take
a certain number of cards from the jury box alternately

Bolen J. Carter

and then try to decide whether they were or were not in excess of the allowed mileage. Then we determined whether to include them or to exclude them. Mr. Reed would stand on one side of the counter and I would stand on the other. When we finished getting the number 515 we were going to keep, we placed the cards back in the box. There never was any actual examination made by me of the cards Mr. Reed separated, and he made none that I separated. The only conversation we ever had concerning the cards was the distance. Other than that, we would not know who the other had included or excluded. There was never any question of looking at the names, we only looked at the distances.

Cross-Examination, by Mr. McKnelly.

518 When I said in my Affidavit that I have never been served with or received a directive or order issued by a judge of the United States District Court for the Eastern District of Illinois, directing the choice of jurors within a specified area, I meant to say that none 520 had ever been given to me personally. I had never counted the cards in the box myself until recently.

Redirect Examination, by Mr. Foreman.

523 I would say that it is highly improbable that on July 23, 1956, we could have drawn the names of 30 jurors out of approximately 300 without drawing at least one juror outside of the 150 mile area. (The order of the court of July 23, 1956, did not restrict the drawing of the jurors from a given area.)

[fol. 213]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1959—January Session, 1960

No. 12815

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

THOMAS D. CLANCY, JAMES F. PRINDABLE and
DONALD KASTNER, Defendants-Appellants.Appeal from the United States District Court for the
Eastern District of Illinois.

OPINION—March 24, 1960

Before Hastings, Chief Judge, and Schnackenberg, Circuit Judges, and Steckler, District Judge.

Steckler, District Judge. Thomas D. Clancy and James F. Prindable, two of the named defendants, were convicted in the district court of making a false statement of a material fact to agents of the United States Treasury Department, Internal Revenue Service, in violation of 18 U.S.C. § 1001; of willfully attempting to evade a substantial amount of wagering excise taxes due and owing by virtue of Chapter 35, subchapter A of the Internal Revenue Code of 1954 (26 U.S.C. § 4401), in violation of 26 U.S.C. § 7201; and of conspiring to violate that subchapter, in violation of 18 U.S.C. § 371. Donald Kastner, the other defendant, was convicted on the latter two counts, but was found not guilty of the false statement count. Trial was by jury.

[fol. 214] Defendants raise numerous points on appeal, all of which can be classified under the following broad headings:

1. The legality of the search and seizure of defendants' books and records.

2. Whether the district court erred in overruling defendants' motions to dismiss the indictment on the grounds that the grand and petit juries were illegally drawn and constituted.
3. Whether the court committed reversible error in refusing to ask certain questions on the *voir dire* examination of petit jurors.
4. Whether the court erred in admitting certain exhibits into evidence, and in admitting testimony as to statements of individual defendants without cautionary instructions to the jury.
5. Whether the court erred in refusing to order the production of reports of federal agents for use by the defendants during cross-examination, pursuant to 18 U.S.C. § 3500.
6. Whether the court erred in refusing to order acquittal both before and after the verdict.
7. Whether the court erred in instructing the jury and in refusing to give certain instructions tendered by defendants.
8. Whether the court erred in refusing to grant a new trial after hearing evidence of possible misconduct on the part of a petit juror.

In order to resolve these issues, a somewhat detailed analysis of the record is essential.

There is evidence in the record that the defendants, Thomas D. Clancy, James F. Prindable and Donald Kastner, were partners in the North Sales Company, and as such were engaged in accepting wagers, principally on horse races, in East St. Louis, Illinois. The defendants, doing business as the North Sales Company, by Thomas Clancy, applied for and received the special tax stamp for the fiscal year ending June 30, 1957 as required by [fol. 215] 26 U.S.C. § 4411. In the special tax return and application for registry-wagering, the business address of the company was designated "at Large — 2401 Ridge Ave. — E. St. Louis, Ill." However, when the application was

produced at the trial by a government witness, the words "at Large" had been penciled through. The defendants filed monthly tax returns of wagers accepted by them and paid the tax reported to be due thereon to the District Director of Internal Revenue at Springfield, Illinois. Defendants received a letter from H. J. White, District Director, dated April 17, 1957, which informed them that a recent examination of their tax liability for the years January, 1955 through December, 1956, indicated that no change was necessary to the tax reported and that the returns would be accepted ~~as~~ filed.

The record indicates that during March, April, and early May of 1957, federal agents of the Internal Revenue Service observed activities which lead them to believe that a gambling operation was being conducted on the premises located at 2300 and 2300A State Street, East St. Louis, Illinois. The first floor of the premises was occupied by a business known as "Zittel's Tavern," and the second floor, 2300A, was an apartment. According to the affidavit for search warrant, Agent Johnson placed wagers with "Heine" and "Murphy" at Zittel's Tavern, the latter being a bartender there, and observed Heine walk to a doorway behind the bar which leads upstairs over the men's toilet and place money envelopes in a stairwell area and close the door. Heine later picked up an envelope from behind the door which contained Agent Johnson's winnings from a prior bet. Johnson also observed scratch sheets, racing forms, money and 4-inch by 6-inch paper pads on the bar, back bar, under the bar, on tables, in the stairwell and in the safe. Agent Mueller observed a man carrying a sack, similar to sacks furnished by banks to carry money, enter the tavern, speak to Murphy, the bartender, and go behind the bar and [fol. 216] through a door which leads upstairs. Agent Yerly

The government witness, Joseph M. Heckelbech, Chief of the Collection Division of the District Director's Office, could not say when the words "at Large" had been stricken out. However, witness Waller, the defendants' bookkeeper, testified that the words "at Large" were not stricken out when he filed the application; that the application was not returned to him as being incorrect; and that the stamp had been issued pursuant to the application.

observed Charles J. Kastner, Jr., brother of the defendant Donald Kastner, and the defendant Prindable, both well known bookmakers, enter Zittel's Tavern at 7:09 and 7:17 a.m., respectively, on May 1, 1957. Agent Ryan entered the tavern shortly after Charles J. Kastner, Jr. on that morning and saw Prindable enter and go behind the bar and through a door that leads upstairs. Agent Buescher interviewed two well known bookmakers in Collinsville, Illinois, and was told by them that they picked up horse bets and ordinarily, received telephone bets at Blaha's Tavern in Collinsville. Agent Busch examined a transcript of toll calls pertaining to Blaha's Tavern, using Illinois Bell Telephone records, and established that between August 11, 1956 and January 25, 1957, twenty-one (21) telephone calls were made between Blaha's Tavern and 2300A State Street, East St. Louis. The telephone at 2300A State Street was subscribed to by one John Leppy. Agent Yerly examined the application for the occupational tax stamp of Charles J. Kastner, Jr. and Prindable, which stated that their business address was 2401 Ridge Avenue.² Joseph M. Heckelbech, Chief of the Collection Division in the office of the District Director at Springfield, examined the records in his custody and determined that no gambling stamp had been issued to John Leppy, Henry D. Zittel, or any other person at 2300A State Street; and that no wagering excise tax returns had been filed by anyone at that address.

Upon this evidence, Agent Johnson applied to the district court for two search warrants, one for the first floor, and the other for the second floor of the building at 2300 and 2300A State Street. (Here on appeal we are concerned only with the search of the second floor, 2300A.) The part the other agents performed in the investigation was set forth in their separate affidavits which were, by reference, made a part of Agent Johnson's affidavit for the search warrant for the second floor. In addition, Agent Edwards corroborated much of the statement of Agent Yerly. The affidavit of Agent Johnson for the search

² This address was actually the residence of defendant Clancy, which appeared after the "at Large" designation had been penciled out.

warrant for the second floor states, in part, that he is positive the premises

[fol. 217] " . . . are being used in the conduct and carrying on of a 'Wagering Business,' . . . against the laws of the United States, that is to say, the offense of wilfully attempting to evade and defeat a tax imposed by the Internal Revenue Laws . . . and the payment thereof, to wit, the special tax of \$50 a year to be paid by each person engaged in the business of accepting wagers . . . ; and the offense of wilfully failing to prepare and file with the district Director . . . the Special Tax Return and Application for Registry-Wagering (Form 11-C) . . . in the name of the operator of said business, namely, one John Doe . . . "

The district court, satisfied that there was probable cause to believe that a wagering business was being conducted on the premises described in violation of the said laws of the United States, issued the search warrants requested on May 5, 1957. The second floor warrant was addressed to "any Special Agent of the Intelligence Division of the Internal Revenue Service of the United States of America," and authorized the seizure of:

" . . . divers records, to wit books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons . . . and divers other tools, instruments, apparatus, United States currency and records . . . "

On May 6, 1957, Agent Kienzler, accompanied by several other agents, executed the second floor search warrant and seized defendants' notes, books and records, currency in excess of \$2,160, racing forms, scratch sheets, telephone bills, a check book, and several metal boxes. Defendant

Donald Kastner was present in the apartment when the search was made and informed the agents that he, Clancy, and Prindable were partners in the North Sales Company and that the partnership had a tax stamp, which Clancy took care of. Agent Kienzler testified that he did not personally determine at that time whether the North Sales [fol. 218] Company actually had a tax stamp, but obeyed the command of the warrant in searching and seizing the items described. Apparently no arrests were made at the time of the raid.

Subsequently, information obtained from the seized records was presented to a grand jury which, on July 25, 1957, returned a five-count indictment against the defendants. The first three counts charged Clancy, Kastner and Prindable severally with making false statements to agents of the Internal Revenue Service in violation of 18 U.S.C. § 1001.³ Count IV charged each defendant with an attempt to evade a substantial amount of wagering excise tax during the fiscal year ending June 30, 1957. In support of this count specific unlawful acts were alleged.⁴ Count V was

³ In Count I, Clancy was charged with making a false statement to Agents Mochel and Buescher on December 13, 1956, when he stated that the North Sales Company had no employees or agents accepting bets other than Charles J. Kastner, Jr. and Malcolm Wagstaff. In Count II, Kastner was charged with making a false statement to Agent Kienzler on May 6, 1957, the day of the raid, by stating that he did not know the names of individuals accepting wagers as agents of the North Sales Company. In Count III, Prindable was charged with making a false statement to Agents Mochel and Buescher on December 14, 1956, when he stated that he did not know any other horse bookies except himself, Clancy and Donald Kastner.

⁴ In substance it was alleged:

1. During March, 1957, defendants reported wagers of \$11,913.50, but actually received wagers in the amount of \$103,441.30.

2. Defendants kept false books and concealed the identity of agents.

3. Defendants concealed and withheld records, sources of income, and lists of agents.

4. Defendants maintained secret places of doing business.

5. All three defendants made false statements to government agents.

the conspiracy count and alleged substantially the same acts as Count IV.

The defendants pleaded not guilty on July 30, 1957, and on August 14th following, filed a joint motion to dismiss the indictment and a motion for return of property and to suppress evidence. As far as relevant here, the motion to dismiss was based upon an allegation that the members of the grand jury were not "selected, drawn or summoned according to law." The motion to suppress attacked the affidavit of Agent Johnson as based on hearsay; the warrant's description of the articles to be seized as too general; the existence of probable cause; and the seizure of allegedly private books and papers. Defendants also filed a motion to inspect the transcript of evidence and record of the foreman of the grand jury.

[fol. 219] In an entry dated July 25, 1958, the district court denied all three of the above motions. The court held, *inter alia*, that the charges in respect to the grand jury were mere "naked allegations"; that probable cause did exist; and that the items seized were specifically described in the warrant and were not private books or papers, but rather "property used in the commission of crime."

On May 8, 1959, defendants filed an amended motion to dismiss with an affidavit of the jury commissioner, Bohlen J. Carter, attached. In the affidavit the jury commissioner states that names of prospective jurors were solicited from various persons, including school superintendents. When the juries were drawn, he and the clerk, Douglas H. Reed, separately took a handful of cards from the box and sorted them according to the distance they lived from the place at which the grand and petit juries were to function, namely East St. Louis, Danville, Cairo, or Benton, Illinois. Only those thought to live within a reasonable distance would be selected. The other names would

In the affidavit Mr. Carter mentioned 50 to 60 miles as a "reasonable distance." In subsequent testimony in another proceeding, made a part of this record by an offer of proof by defendants, Mr. Carter corrected this statement by stating that the distance was actually 100 to 125 miles. Mr. Reed testified in this extraneous proceeding that the distance was approximately 150 miles.

be placed back in the box. Carter also stated that he did not know how many names were in the box, but estimated about 200 or possibly 400 to 500. Defendants complained that the grand jury was not selected according to law, 28 U.S.C. § 1864, and that it was not selected by chance, but by "whim and caprice."

The court denied the amended motion to dismiss on the grounds that the grand jury had been properly drawn; that even if there were irregularity, defendants had failed to show prejudice or the violation of any constitutional rights; and that the motion was filed too late according to local rules.

During the course of the trial, the court admitted the search warrant and return (Government Exhibit 29a) and the various records and articles seized in the raid (Government Exhibits 54 through 112) into evidence. Defendants objected on the basis of an illegal search and also on the ground that relevancy and materiality had not been shown. Agent Kienzler merely stated that these were the [fol. 220] articles seized in the raid. Later, however, the chain of custody of the exhibits was established and Agent Moehel testified that he had used Exhibits 54 through 79 to determine that the total amount of bets actually placed with defendants in March, 1957, was \$103,441.30.

Defendants also objected to the admission into evidence generally of statements allegedly made by them individually to government agents. Defendants claim that such statements were admissible only as against the one making them, since a conspiracy had not yet been established, and, as to the statements of defendant Kastner, that any conspiracy, if it had existed, was terminated when the statements were made.

Agents Buescher and Moehel testified that they interviewed Clancy on December 13, 1956 in the office of Press Waller. They testified that during the interview Clancy identified the other defendants as partners in the North Sales Company; stated that they had no particular place of business; and that they had only two agents. The agents also testified that Clancy stated that they did not use the telephone, but went from place to place accepting wagers. The statement made by Clancy during this interview with

respect to not having any employees or agents; other than Charles J. Kastner, Jr. and Malcolm H. Wagstaff, was the basis of Count I of the indictment.

Agents Buescher and Mochel also testified that they had an interview on December 14, 1956, with Prindable in Waller's office, in the presence of Donald Kastner. In the interview, according to the testimony, Prindable stated that he paid off bettors in person and that he never "laid off" any bets. In answer to a question asking whether he could recommend another bookie to take a bet larger than he could handle, Prindable stated that he did not know of any other horse bookies except himself, Clancy and Donald Kastner. The latter statement was the basis of Count III of the indictment.

Agents Kienzler and Minton were permitted to testify to the substance of a conversation between Kienzler and the defendant Kastner at the time of the raid. According to the testimony, Kastner stated that he was a junior partner and clerk of the North Sales Company, answered the telephone and took bets. He worked on a commission [fol. 221] basis. Kastner named the other two defendants as partners and stated that Clancy took care of the records and had the tax stamp. This interview was the basis of Count II of the indictment.

Supervisor Hudak and Agent Mueller testified to the substance of a second interview with Kastner in the offices of the United States Attorney in the Federal Building in East St. Louis, on July 23, 1957, two and one-half months after the raid. According to their testimony, Kastner in this interview admitted taking bets by telephone at 2300A State Street and also at the residence of one Vernon Lampe. He explained in detail the manner in which bets were recorded and the business conducted. Kastner also named various "agents" who accepted bets for the North Sales Company, including Merlin Behnen, a tavern keeper, and Otto Pohlman; and described the arrangements had with the "agents," i.e., forty or fifty per cent bets, in which the "agents" received forty or fifty per cent of the profit and shared forty or fifty per cent of the loss, or five per cent bets, in which the agents received five per cent of the gross amount of bets placed.

After Agent Buescher had testified to the interviews with Clancy and Prindable, the defendants on cross-examination established that Buescher had prepared, signed and submitted to his superior, Mochel, a written report pertaining to the substance of the interviews. The report was composed after Buescher had returned to his office. Buescher did not take longhand notes at the time of the interviews, but in preparing the report agreed with and used contemporaneous longhand notes taken by Agent Mochel. During the testimony of Agent Minton it was brought out that he made a similar report to his superiors, under like circumstances, following the conversation between Kienzler and Donald Kastner at the time of the raid on May 6, 1957.

Defendants demanded production of these reports for use during cross-examination under the provisions of the so-called "Jencks Act." 18 U.S.C. § 3500. The district court denied the requests on the ground that the reports were not made contemporaneously with the interviews, but subsequent thereto. However, the court did require the Government to turn over to the defendants for inspection after direct examination, the longhand notes taken at the time of the interviews by the agents. Thus, defendants [fol. 222] received the notes taken by Agent Mochel during the interviews with Clancy and Prindable in December, 1956, and the notes taken by Supervisor Hudak and Agent Mueller during the interview with Kastner in the Federal Building on July 23, 1957. Defendants made no request for any notes taken by Agent Kienzler during the May 6, 1957 conversation with Kastner.

The defense called no witnesses, but attempted to develop a theory of defense by cross-examination of government witnesses and argument of counsel. As to the false statement count against Clancy, the defense theory apparently was that the individual bet takers, other than Charles J. Kastner, Jr. and Malcolm Wagstaff, were "independent contractors," rather than "agents." The statement of Prindable, that he did not know any other horse bookies, according to defense counsel, was not false when considered in context. The agents had asked him if he could recommend any other book to take a bet larger than

he could handle. His reply, under the circumstances, it is asserted, meant that he did not know any other horse book that would take bets larger than he. The principal theory as to Counts IV and V was apparently that the excess of bets, not reported, represented "lay-off" bets from other bookies. The defendants allegedly did not know that they were required to report these bets as part of the gross bets received. Defendants also argue that all of the evidence as to willfulness applied only to Clancy, who actually had charge of the books and records.

The trial court overruled defendants' motions for acquittal and submitted the case to the jury. The defendants tendered certain instructions, which the court refused to give, and to this, the defendants complain that the court failed to properly instruct the jury on their theory of the case. Defendants also objected to certain of the court's instructions as not supported by the evidence, as being misleading and confusing to the jury, and as not containing all the elements of the crimes charged.

Subsequently, defendants filed motions for acquittal notwithstanding the verdict and for a new trial. One of the grounds urged in support of the latter motion was that a petit juror who served in the case had stated privately to another prospective juror that he was prejudiced against anyone who accepted wagers; but on voir dire stated that he was not so prejudiced. In support of this allegation, [fol. 223] defendants called one Mrs. Vera Simmons, an original member of the jury panel, who testified that a male juror sitting next to her stated privately that he felt the same as she did, after Mrs. Simmons acknowledged prejudice against gamblers to the court and was excused for cause. Mrs. Simmons could not remember the juror's name, on which side of her he sat, or whether he had actually served on the petit jury. One of defendants' counsel, Paul P. Waller, Jr., asked permission to testify as to the seating arrangement of the jury panel, and offered to prove that the male jurors sitting on both sides of Mrs. Simmons did in fact serve on the petit jury, and that one of them, Clinton Beinfohr, served as the foreman of the jury. The court denied permission to testify, unless Mr. Waller would

withdraw from the case. Mr. Waller refused to withdraw, and his testimony was not heard.

The court denied the motions for judgment of acquittal notwithstanding the verdict and for a new trial. In regard to the misconduct of juror issue, the court stated that the testimony of Mrs. Simmons absolutely failed to substantiate the allegations of misconduct on the part of a juror who actually served. Further, the court stated that the defendants' counsel had reported the matter to the court in a conversational manner in chambers during the trial. The court at that time advised counsel that there was nothing before it on which to act. However, the defendants made no motion or request of any kind, but waited until after the verdicts of guilty had been returned before pursuing the matter fully. Under the circumstances, the district court concluded, defendants, "failed to challenge the alleged prejudice of the juror in apt time."

The defendants' first major argument concerns the denial of the motion to suppress. In support of their argument, defendants attack the basis upon which the warrant was issued, the form of the warrant itself, and the nature of the articles seized pursuant thereto.

It seems paramount that we first determine whether there was probable cause to believe a crime was being committed at the premises to which the affidavits and search warrants were directed. Defendants say there was no probable cause and that the affidavits were invalid because based upon hearsay.

In determining whether probable cause exists for the issuance of a search warrant it need not be determined [fol. 224] whether the offense charged has actually been committed; the only concern being whether the affiant has reasonable grounds, at the time of the making of the affidavit and the issuance of the warrant, for believing the law was being violated on the premises to be searched. *Dumbra v. United States*, 268 U.S. 435, 441 (1925); *Carney v. United States*, 163 F.2d 784, 786 (9th Cir. 1947), cert. denied, 332 U.S. 824. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of

reasonable caution that a crime is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949); *Dumbra v. United States*, *supra*.

It appears from the argument made by the defendants that they would have this court consider only their status as licensed gamblers, and disregard the knowledge the agents had in respect to the activities taking place at the State Street address. They assume the warrant was issued for the express purpose of seizing their books and records, for they argue that since they had registered, received a wagering stamp, and paid some wagering taxes, there was no probable cause for seizure of their books. But, as pointed out by the Government, what defendants overlook by such argument is the fact that the warrant was not issued for the purpose of seizing *their* books. The warrant was directed to certain premises and ordered the seizure of property described therein. It did not order the seizure of defendants' property because it was not known at the time who was operating the wagering business at the address stated in the warrant. From the agents' observations there was probable cause to believe that a wagering activity was being operated in violation of the laws of the United States, especially since the premises had not been reported to the District Director as required by 26 U.S.C. § 4412.⁶ See *Merritt v. United States*, 249 F.2d 19 (6th Cir. 1957).

[fol. 225] The defendants' argument that the search warrant for the second floor of the building was invalid because issued upon affidavits based upon hearsay, is likewise without merit. A cursory examination of the affidavits upon which the warrant was issued, without regard to hearsay, and based only on the knowledge of the affiants from

§ 4412. Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

- (1) his name and place of residence;
- (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wages for him or on his behalf;

personal observations, clearly takes this case out of the ambit of the cases relied on by the defendants, i.e., *Sparks v. United States*, 90 F.2d 61 (6th Cir. 1937); *Crank v. United States*, 61 F.2d 981 (8th Cir. 1932); *Simmons v. United States*, 18 F.2d 85 (8th Cir. 1927); *United States v. Clark*, 18 F.2d 442 (D. Montana 1927); and *United States v. Lassoff*, 147 F. Supp. 944 (E.D. Ky. 1957).

As to the form of the search warrants, defendants state that they were void in that they were not directed to any particularly named person, but rather to a class; that the property to be seized was not capable of accurate determination, inasmuch as the words, "letters, tickets, papers, records and books," is not a sufficient description; that exploratory searches may not be made to look for evidence with or without a search warrant, and that an invalid search is not made lawful by what it brings to light.

By the terms of 18 U.S.C. § 3105, it is provided:

"A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

Although it would be a better practice to direct the search warrant to a particular officer by name, the statute does not require it. So long as the warrant is directed to civil officers of the United States authorized to enforce or assist in enforcing any law thereof, or otherwise authorized to serve such warrant, even though they are not specifically named, but identified, it is sufficient. Rule 41(c). F.R.Cr.P., *Gandreau v. United States*, 300 Fed. 21, 25 (1st Cir. 1924); see *United States v. Smith*, 16 F.2d 788, 789 (S.D. Fla. 1927); *United States v. Nestori*, 10 F. 2d 570, 571 (N.D. Cal. 1925); *Boehm v. United States*, 6 F.2d 497, 498 (7th Cir. 1924); *United States v. Tolomeo*, 52 F. Supp. 737, 738 (W.D. Pa. 1943).

[fol. 226] That the articles to be seized by virtue of the search warrant were described with sufficient particularity, can hardly be questioned in view of the authorities. *Nuckols*

v. United States, 99 F.2d 353, 355 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 626; *Merritt v. United States*, 249 F.2d 19 (6th Cir. 1957); see also, *Clay v. United States*, 246 F.2d 298 (5th Cir. 1957), *cert. denied*, 355 U.S. 863.

In the *Nuckols* case, *supra*, a search warrant was held sufficient which commanded the seizure of "... gaming tables, gambling devices, race horse slips and gambling paraphernalia..." The court said, at page 355:

"In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods."

And in *Merritt v. United States*, *supra*, at page 20, the court approved affidavits for a search warrant, and the search warrant, where the affidavits described only "... lottery tickets and other paraphernalia which will indicate a numbers operation is being conducted on the premises."

As to the contention that the search was exploratory, in view of the evidence, and what we have heretofore set forth, we cannot agree that the search was merely exploratory.

The remaining point raised with respect to the motion to suppress is that the search and seizure was unreasonable and in contravention of defendants' rights under the Fourth and Fifth Amendments to the Constitution, for the reason that *private* books, records, papers and documents are not subject to seizure, even under authority of a search warrant. This protection, they contend, extends to partnership books and papers. Defendants make the point that the property seized, constituted, "at most, evidence and did not constitute the instrumentalities for the commission of a crime against the United States."

The basis of their argument is that they had filed an application for registry-wagering and had, in fact, obtained a wagering stamp for the period in question; had filed monthly reports and paid the full amount of the tax reported. Consequently, it is argued that the books and records were not "instrumentalities" of a crime against [fol. 227] the United States, and therefore could not be

seized except in contravention of their constitutional rights. Stated in another way, it is insisted that in so far as the federal laws were concerned, defendants were engaged in a legitimate enterprise, and, for that reason, the books, papers and records used in connection therewith were not contraband, but private papers, protected against seizure under the Fourth and Fifth Amendments. Defendants rely heavily upon *Takahashi v. United States*, 143 F.2d 118 (9th Cir. 1944). In that case the defendants were charged with conspiracy, with violation of an executive order by designating China as the country of destination on an application for license to export certain new storage tanks when in fact Japan was the country of ultimate destination, and with causing false and fraudulent statements to be made in the application in a matter within the jurisdiction of the Department of State. Custom officers seized the documents in question, including code telegrams, letters, and other papers, indicating the true destination of the tanks was Japan. The court of appeals held that a motion to suppress should have been sustained and overruled the contention that the papers were more than mere evidence but were themselves the instrumentalities of a crime. The court in substance said that although the application for the license itself would be an instrumentality for the commission of a crime, the tanks themselves and papers taken from the defendants were mere evidence of an intention on the part of the defendants to commit a crime under both of the substantive counts in the indictment. In other words, evidence of crime or *malum in futuro*. Specifically the court said, at page 124:

"The distinction must be drawn between papers which are a part of the outfit or equipment actually used to commit an offense such as the ledgers and bills used to maintain a nuisance exemplified by the situation developed in *Marron v. United States*, 275 U.S. 192, 199, 48 S.Ct. 74, 72 L.Ed. 231, and those papers which are simply evidences of intent, design or even of the agreement of the defendants."

Thus, the *Takahashi* case recognizes the rule that ledgers, bills and other types of books and records, may be the

instrumentalities of a crime. We hold that gambling paraphernalia, such as that used by the defendants, when used [fol. 228] in commission of a crime in violation of 26 U.S.C. § 7201, i.e., knowingly attempting to defeat and evade the wagering tax, becomes "a part of the outfit or equipment actually used to commit an offense," as mentioned in *Takahashi, supra*. See *Merritt v. United States, supra*; *Foley v. United States*, 64 F.2d 1 (5th Cir. 1933), cert. denied, 289 U.S. 762; *Landau v. United States Attorney*, 82 F.2d 285 (2d Cir. 1936).

Furthermore, there is good authority for holding that the books, records and papers seized in the case at bar were not such *private* papers as to be clothed with immunity from seizure and use against the defendants under the Fourth and Fifth Amendments. Under 26 U.S.C. §§ 4403, 4423, 6001, and United States Treasury Regulation 132 § 325.32, the defendants were required to keep books and records reflecting transactions carried on in the course of a taxable wagering activity. Such records were to be kept on a day-to-day basis and were required to be made available for inspection by Internal Revenue officers at all times. In the case of *Boyd v. United States*, 116 U.S. 616 (1886), a case relied on by the defendants, the court stated, at 623-624:

"The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government . . .

As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by

law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures."

This exception to the privilege against self-incrimination and searches and seizures, has come to be known as [fol. 229] the "required records exception," and has been recognized in numerous cases. *Shapiro v. United States*, 335 U.S. 1, 17-20, 32-33. (1948); *Davis v. United States*, 328 U.S. 582, 589-590 (1946); *Wilson v. United States*, 221 U.S. 361, 380 (1911); *Smith v. United States*, 236 F.2d 260, 268 (8th Cir. 1956), cert. denied, 352 U.S. 909, rehearing denied, 353 U.S. 989; *Beard v. United States*, 222 F.2d 84, 92-94, (4th Cir. 1955), cert. denied, 350 U.S. 846, rehearing denied, 350 U.S. 904. See also, Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. of Chi. L. Rev. 687 (1951).

In *Shapiro, supra*, at page 33, the court stated:

"... the privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established."

In view of what has here been said, we conclude that the trial court committed no error in denying the defendants' motion to suppress.

We next take up the jury selection issue. We note that the original motion to dismiss did not specify any grounds and was not supported by competent evidence. Further, the amended motion to dismiss, at most, complained of mere irregularities and was filed too late according to the local rules of the district court.

Rule 27, Rules of the United States District Court for the Eastern District of Illinois, provides:

"(1) A plea in abatement to an indictment directed against the legality of the grand jury returning said indictment shall not be entertained by the court unless the same shall have been filed within 10 days from the date of the return of the indictment;

It is significant to note that the local rule is substantially the same as former Section 556(a) of Title 18 U.S.C. That statute was discussed in *Wright v. United States*, 165 F.2d 405, 407 (8th Cir. 1948). The court held that the right to challenge the grand jury panel was waived as the challenge was not seasonably presented in accordance with the ten-day limitation. In the recent case of *Scales v. [fol. 230] United States*, 260 F.2d 21 (4th Cir. 1958), *rev'd on other grounds*, 355 U.S. 1, the court of appeals affirmed the district court's decision in refusing to entertain a motion challenging the grand jury. The decision was based upon Rule 12 of the Federal Rules of Criminal Procedure, inasmuch as the lower court had no rule comparable to Rule 27 of the lower court in this case. There the court noted, as in the instant case, the information upon which the motion was based was at all times available to the defendant. In that case the defendant was less than one year delinquent in making his motion, whereas here the defendants delayed almost twice that long. Most significant to us, however, is the defendants' failure to show any prejudice or the violation of any constitutional rights, either with respect to the grand jury, or the petit jury.

The defendants' motion to strike the array because of the alleged improper choosing and selection of the petit jury was filed after the jury had been selected. In their argument, defendants cite *Ballard v. United States*, 329 U.S. 187 (1946) and *Glasser v. United States*, 315 U.S. 60 (1942). Those cases involved a systematic exclusion from the jury panel because of a particular sex or group. Nothing of the kind is involved in this case. In short, we find nothing wrong with the manner in which the prospective jurors' names were obtained. See *Local 36 of International Fishermen and Allied Workers of America v. United States*, 177 F.2d 320, 341 (9th Cir. 1949); *Scales v. United States*, *supra*. Nor do we find material irregularity in the

provided, however, that in the event the defendant has not been apprehended at the time the indictment is found such plea shall be filed within 10 days after his apprehension, unless he or his counsel shall sooner have been apprised of his indictment, in which case the plea shall be filed within 10 days after he or his counsel shall have been apprised of his indictment."

drawing of the names of those prospective jurors who were summoned for petit jury duty. *United States v. Gottfried*, 165 F.2d 360, 364 (2d Cir. 1948), *cert. denied*, 333 U.S. 860, *rehearing denied*, 333 U.S. 883; *United States v. Skidmore*, 123 F.2d 604, 607 (7th Cir. 1941).

Turning next to the alleged error in the court's conduct of the voir dire examination, it is well settled that such examination is within the discretion of the trial judge, and the exercise of such discretion will not be disturbed on appeal in the absence of a clear showing of abuse. *United States v. Lebron*, 222 F.2d 531, 536 (2d Cir. 1955), *cert. denied*, 350 U.S. 876; *Speak v. United States*, 161 F.2d 562, 563 (10th Cir. 1947). The two tendered questions asked by the court⁵ were designed to uncover prejudice against [fol. 231] gamblers and religious scruples against gambling. The other questions tendered were merely cumulative and argumentative.⁶ As to this issue we find no abuse of judicial discretion.

The trial court likewise has broad discretion in the order of admitting evidence at the trial. *United States v. Bender*, 218 F.2d 869, 873 (7th Cir. 1955), *cert. denied*, 349 U.S. 920. Here the articles seized in the raid were relevant in the attempt to prove that the defendants were engaged in a wagering business and not paying the full amount of the required excise tax, a fact which the Government had to prove to secure a conviction on Counts IV and V of the indictment. Some of the exhibits were later used by

"2. Do you teach Sunday School?

"7. Would you be prejudiced against anyone who accepts wagers?"

"1. Do you believe that gambling itself is immoral, per se, or morally wrong?

"3. To what denomination, if any, do you so teach? . . .

"4. We also ask the Court to ask the jurors if they can give these defendants a fair trial even though the evidence shows that the laws, gambling laws, of the State of Illinois were violated. . .

"5. Can you separate the violation of the law with which they are charged in the indictment, that is, the laws of the United States separate and apart from the violation of state laws?

"6. Do you have a prejudice against people engaged in the business of operating horse books?"

Agent Mochel in support of his testimony that defendants received gross wagers in the amount of \$103,441.30, in March, 1957.

The admission of the agents' testimony without cautionary limitation concerning the substance of the four interviews with the defendants was not, in our view, reversible error. Evidence of admissions of co-conspirators may be presented prior to the conclusive establishment of the conspiracy without commission of error so long as the conspiracy is established at some time during the course of the trial. *United States v. Sansone*, 231 F.2d 887, 893 (2d Cir. 1956), *cert. denied*, 351 U.S. 987. Since the jury could conclude from all the evidence that a conspiracy had been conclusively established, there was no error in the admission of the evidence on that ground. It is likewise clear that the conspiracy, if any, had not terminated in December, 1956, the time of the interviews with Clancy and Prindable, and on March 7, 1957, the time of the first interview with Kastner. The second interview with Kastner, on July 23, 1957, presents a more difficult question. [fol. 232] Although no arrests had been made up to that time, the defendants' gambling operation had been raided, and their books and records seized, some two and one-half months prior thereto. However, defendants were not subsequently charged with operating an illegal gambling business, but with attempting to evade a substantial amount of wagering excise tax. The district court could reasonably find that a conspiracy to violate 26 U.S.C. §7201 had not terminated at the time of the July 23d interview. The usual criterion for determining the conclusion of a conspiracy is the arrest of the co-conspirators. *Sandez v. United States*, 239 F.2d 239, 243 (9th Cir. 1956); *Cleaver v. United States*, 238 F.2d 766, 769 (10th Cir. 1956). Cf. *Scarborough v. United States*, 232 F.2d 412 (5th Cir. 1956). Moreover, even if the declarations of one co-conspirator are erroneously received as evidence against another co-conspirator, there is no reversible error if, as here, there is other competent evidence sufficient to prove the facts sought to be established by such declarations. *Massicot v. United States*, 254 F.2d 58, 64 (5th Cir. 1958); *Papadakis v. United States*, 208 F.2d 945, 953 (9th Cir. 1953).

The next contested issue is whether the trial court erred in refusing to order the Government to produce the memoranda or reports of the government agents pursuant to the "Jencks" Act, 18 U.S.C. § 3500.¹⁰ Defendants rely on the [fol. 233] decision in *Bergman v. United States*, 253 F.2d 933 (6th Cir. 1958).

Since the "Jencks" Act was the direct outgrowth of the decision in *Jencks v. United States*, 353 U.S. 657 (1957), the statute must be read and interpreted in the light of that decision. *Palermo v. United States*, 360 U.S. 343, 345 (1959). "The Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design to hold that the defense may see

¹⁰ The pertinent parts of the statute read:

"§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

• • •

"(c) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

statements in order to argue whether it should be allowed to see them." *Palermo v. United States, supra*, page 354.

We think there is a distinction between the type of case here at hand and those cases in which the Government produces as a witness an undercover agent whose dealings with the accused are the subject of the agent's testimony at the trial. Here the defendants were aware of the identity of the government agents at the time they made the statements which later furnished the basis of the prosecution against them. They were not dealing with undercover agents whose true identity they did not know. Cf. *Jencks v. United States, supra*; *Bradford v. United States*, 271 F.2d 58 (9th Cir. 1959); *United States v. Prince*, 264 F.2d 850 (3d Cir. 1959).

The final decision as to production must rest within the good sense and experience of the district judge guided by the standards as outlined by the Supreme Court,¹¹ and subject to the appropriately limited review of the appellate courts.

It is significant to note, that at the request of defendants' counsel the court required the Government to turn over to the defense, for use in cross-examination, the long-hand notes taken at the time of the interviews. In view of this, we are unwilling to agree that there was an abuse of judicial discretion on the part of the trial judge in not ordering the production of the memoranda prepared by the witnesses after the interviews had been completed, [fol. 234] particularly since parts of the memoranda were based upon the notes and interpretations of other agents. We hold that such reports and memoranda are not statements within the meaning of the statute. Accordingly, the defendants were not entitled to their production for use in the trial. *Palermo v. United States, supra*; *Johnson v. United States*, 269 F.2d 72 (10th Cir. 1959); *Borges v. United States*, 270 F.2d 332 (D.C. Cir. 1959); *Papworth v.*

¹¹The Supreme Court has said that the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration, nor that the statement be admissible as evidence. *Palermo v. United States, supra*, p. 353, n. 10.

United States, 256 F.2d 125 (5th Cir. 1958), cert. denied, 358 U.S. 854, rehearing denied, 358 U.S. 914.

Next, defendants complain that the trial court committed reversible error in refusing to direct an acquittal, or in the alternative to grant a new trial. In support of this allegation, defendants argue that the Government failed to prove that the tax allegedly due was in fact not paid by the various government witnesses who testified that they had received bets ultimately covered by the defendants. This argument is based upon defendants' contention that the various tavernkeepers who accepted bets were not "agents" of the North Sales Company, but rather independent bookies who were themselves liable for the 10 per cent excise tax on wagers accepted by them, notwithstanding the fact that they laid-off a portion of the bets to defendants. Treasury Regulation 325.24(b).

The record shows that on cross-examination by defendants' counsel, the tavernkeepers testified that the defendants exercised no control over them as to which bets to accept or reject. However, the record also shows that all but one testified that they were directly engaged by one of the defendants to receive wagers, and received their commissions on a monthly basis. They also testified that upon receiving wagers they reported them to the North Sales Company by telephone. A messenger delivered form sheets and scratch sheets to them and either picked up the money received as wagers, or left money for the payment of winners. It appears that all records of wagers and computations of winnings and losses were made by defendants. Agent Mochel testified that his examination of defendants' books and records did not reveal any attempt to differentiate between regular bets and lay-off bets. Likewise, defendants did not report that they had accepted any lay-off wagers on their wagering tax returns [fol. 235] for July, 1956, through April, 1957, although they were required to report the "[g]ross amount of lay-off wagers accepted during month."

Under these circumstances, the jury could have found that the tavernkeepers were not independent bookies, themselves liable for the tax, but rather that they were accepting bets for the defendants. See *United States v.*

Calamaro, 354 U.S. 351, 356 (1957). Furthermore, we find no statutory language which would require the Government to prove that the tax allegedly due from the defendants was not paid by someone else? See 26 U.S.C. §§ 4401, 6419(b) and 7201.

The defendants also contend that the Government failed to prove "willfulness," "knowledge," or "intent" with respect to Counts I, III, IV and V of the indictment. Here again, defendants rely on the "independent bookie" theory, and that the amount of bets not reported constituted lay-off bets, which defendants in good faith thought they did not have to report. As heretofore stated, these were questions for the jury.¹² "The specific willful intent and bad motive required for conviction . . . is, of course, inherently insusceptible of direct proof." *Lloyd v. United States*, 226 F.2d 9, 14 (5th Cir. 1955).

Defendants' alternative argument, that any proof of willfulness applies only to Clancy, must likewise fail. Although it appears from the record that Clancy alone signed the tax returns and had charge of the books and records, it was also established that Prindable and Kastner were partners in the enterprise with a proprietary interest. The jury could reasonably find from all the evidence that the latter two also had the requisite intent. This case is not like the situation in *Ingram v. United States*, 360 U.S. 672 (1959), relied upon by defendants, where the court reversed the convictions of two relatively minor clerical functionaries at the headquarters of the operation.

Further, defendants contend as to Count V, that there was no evidence produced by the Government of an agreement to commit an offense against the United States. However, evidence of an express agreement is unnecessary. As [fol. 236] this court stated in *United States v. Gordon*, 138 F.2d 174 (7th Cir. 1943), at page 176:

"[A conspiracy] is seldom capable of proof by direct testimony and may be inferred from the things actually done. It is enough if the minds of the parties

¹² The evidence that defendants did not segregate lay-off bets in their own books or tax returns could be considered by the jury as showing willfulness or intent.

meet and unite in an understanding way with the single design to accomplish a common purpose, which may be established by circumstantial evidence or by deduction from facts from which the natural inference arises that the overt acts were in furtherance of a common design, intent and purpose. . . . If the parties act together to accomplish something unlawful, a conspiracy is shown."

Here, the jury, considering all the evidence, could reasonably find that an unlawful conspiracy did exist. There is no reason for this court to upset the jury's finding. See *Pereira v. United States*, 347 U.S. 1, 12 (1954).

Defendants also argue that the trial court committed reversible error in failing to give certain instructions to the jury which they tendered, and in wrongfully instructing the jury as to the law of the case. We have examined the court's instructions and find them as a whole to be correct in law and fair to the defendants. The materiality of the false statements in Counts I and III of the indictment is a question for the court and not the jury. *United States v. Alu*, 246 F.2d 29, 32 (2d Cir. 1957); *United States v. Parker*, 244 F.2d 943, 950 (7th Cir. 1957), cert. denied, 355 U.S. 836.

True, defendants were entitled to instructions on their theory of the case for which there was any foundation in the evidence, even though they did not present any testimony. *United States v. Indian Trailer Corporation*, 226 F.2d 595, 598 (7th Cir. 1955); *United States v. Phillips*, 217 F.2d 435, 441 (7th Cir. 1954). However, they were not entitled to instructions "resting upon mere speculative assertions manufactured wholly from thin air." *United States v. Achilli*, 234 F.2d 797, 808 (7th Cir. 1956), cert. denied, 352 U.S. 916, vacated 352 U.S. 1023, affirmed 353 U.S. 373, rehearing denied 354 U.S. 943.

A review of defendants' tendered instructions relied upon on appeal reveals that they are either partially incorrect in law (Instruction VIII), covered in substance by the court's instructions (Instruction XIX), not supported by the evidence (Instruction III), or abstract and irrelevant (Instruction IX). The court committed no re-

versible error in refusing to give such tendered instructions.

Finally, as respects the defendants' last major argument concerning alleged misconduct on the part of a juror, and the court's refusal to allow one of the attorneys for the defendants to testify regarding the same unless he withdrew from the case, we find no merit.

The disposition of a motion for new trial rests within the sound discretion of the trial judge, and his ruling on the motion is subject to review only for an abuse of judicial discretion. *United States v. Empire Packing Co.*, 174 F.2d 16, 20 (7th Cir. 1949). Moreover, the integrity of the jury may not be assailed by mere suspicion and surmise, but it is presumed that the jury are true to their oath and conscientiously observe the instructions of the court. *United States v. Sorcery*, 151 F.2d 899, 903 (7th Cir. 1945).

Although an attorney is competent to testify in his client's behalf, the court is then justified in excluding him from further participation in the trial. *Christensen v. United States*, 90 F.2d 152, 155 (7th Cir. 1937). Here, the attorney refused to withdraw from the case; and we hold that under such circumstances, it was not an abuse of discretion for the court to refuse to hear his testimony.

The testimony of Mrs. Simmons was plainly insufficient to support defendants' allegations that a juror *who actually served* on the petit jury had answered falsely on *voir dire* examination and was prejudiced against gamblers.

Also, it is clear from the trial court's memorandum that defendants waived the objections to the qualifications of the petit juror which they press here. If a party obtains knowledge during the progress of a trial of misconduct on the part of a juror, he must object at once, or as soon as the opportunity is presented, or be considered as having waived his objection. See 89 C.J.S., Trial § 483. Merely calling the matter to the attention of the court without any objection thereto is insufficient; and it is not incumbent upon the court to take action with respect thereto on its own volition. 89 C.J.S., Trial § 484. The defendants knew [fol. 238] of this matter during trial, but did not pursue it fully or make a motion of any kind. Under these circumstances, defendants waived any objection arising therefrom.

For the reasons herein set forth, we affirm the judgment of the district court.

Affirmed.

SCHNACKENBERG, Circuit Judge, concurring.

The failure of the trial judge to require the production by the government of the memoranda prepared by certain government witnesses presents a difficult question on this appeal. However, I am not convinced that Judge Steckler's holding on that subject is wrong.

The language in the cases which he cites lends considerable support to his conclusion.

[fol. 239]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: Hon. John S. Hastings, Chief Judge, Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. William E. Steckler, District Judge.

No. 12815

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

THOMAS D. CLANCY, JAMES F. PRINDABLE and
DONALD KASTNER, Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois.

JUDGMENT—March 24, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, in accordance with the opinion of this Court filed this day.

[fol. 240]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—April 14, 1960

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

[fol. 241] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 242]

SUPREME COURT OF THE UNITED STATES

No. 932, October Term, 1959

THOMAS D. CLANCY, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

OFFICE-SUPREME COURT U.S.

FILED

MAY 11 1959

JAMES R. BROWNING, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. ~~922~~ 88

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit.

PAUL P. WALLER, JR.,
JOHN F. O'CONNELL,
Suite 214, Murphy Building,
East St. Louis, Illinois.
Counsel for Petitioners.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No.

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit.

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on March 24, 1960.

OPINION BELOW.

The opinion of the Court of Appeals has not as yet been reported and is printed in the Appendix B, *infra*, pp. 23-54.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 24, 1960 and is reprinted in the Appendix B, to this petition at page 55. A timely petition for rehearing was filed by Petitioners and this petition was denied on April 14, 1960. The jurisdiction of this court is invoked under 28 U. S. C. A., Sec. 1254 (1).

QUESTIONS PRESENTED.

I. Whether books and records kept by Petitioners in their business of accepting wagers on horse races (where they have prepared and filed with the District Director of Internal Revenue the special tax return and application for registry; paid the special \$50.00 tax; and, received their wagering stamp), are protected by the Fourth and Fifth Amendments to the Constitution of the United States from search and seizure for the purpose of being used in a criminal trial against them, on the grounds that said books and records are merely evidence of an offense as opposed to being property designed, or intended for use, or which is, or has been used as the **means** of committing a criminal offense as set forth in Federal Rules of Criminal Procedure 41 (b).

II. Whether private books and records, which necessarily must be maintained in an orderly conduct of a wagering business, lose their status as private books and records so as to be seized and used in evidence in a criminal case, notwithstanding the Fourth and Fifth Amendments to the

Constitution of the United States, because Title 26, U. S. C., Sections 4403, 4423, and 6001, and, U. S. Treasury Regulations 325.32 require books and records to be kept reflecting transactions carried on in the course of a taxable wagering business.

III. Whether after a government agent has testified for the government, the government is required to produce the statements, memoranda or reports of the government agent, which he, himself, has made relevant to the subject matter of his testimony, upon the demand of the defendants' attorney, prior to cross-examination of the government agent pursuant to Title 18, U. S. C., Sec. 3500 (The Jencks Act).

STATUTES AND RULE INVOLVED.

Title 18, U. S. C., Section 3500 (a), (b), (c) (App. A., p. 19).

Title 26, U. S. C., Section 4403 (App. p. 20).

Title 26, U. S. C., Section 4423 (App. A., p. 20).

Title 26, U. S. C., Section 6001 (App. A., p. 20).

Title 26, U. S. C., Section 7605 (b) (App. A., p. 21).

U. S. Treasury Regulations 325.32 (a), (b) (App. A., p. 22).

Federal Rules of Criminal Procedure 41 (b) (App. A., p. 21).

AMENDMENTS TO CONSTITUTION OF UNITED STATES.

Amendment IV (App. A., p. 22).

Amendment V (App. A., p. 22).

STATEMENT

On May 6, 1957, and for four years prior thereto, the Petitioners were engaged in the business of accepting wagers on horse races. Each year they were so engaged, the Petitioners had prepared and filed with the District Director of Internal Revenue at Springfield, Illinois a special tax return and application for registry-wagering Form 11-C; paid the \$50.00 special tax; and, received their wagering stamp. For each month during these years, the Petitioners filed monthly reports of wagers accepted by them and paid the tax on the wagers reported.

On May 6, 1957, Internal Revenue Agents went to the premises known as 2300a State Street, at which place the Petitioners were conducting a wagering business, and made a search of the premises. At the time of the raid, Petitioner Kastner was present and he informed the Internal Revenue Agents that the wagering business was being conducted by the North Sales Company, which had been issued a special wagering stamp for the year 1956-1957. Although no arrests were made on the premises the Internal Revenue Agents nonetheless seized the books and records of the Petitioners maintained by them in the operation of their wagering business, which consisted of the following: a daily recap of the bets received by Petitioners for the month of March, 1957 (Government's Exhibits 54 through 79; Appellants' App. 89-90); recapitulation of all bets received by the North Sales Company for the month of April, 1957, and to and including May 4, 1957 (Government's Exhibits 80 through 109; Appellants' App. 90-91); a recapitulation of the profits of the North Sales Company (Government's Exhibit 110; Appellants' App. 91); a racing form wrapped around a record of wagers received by the North Sales Company for a particular day (Government's Exhibits 111A to 111RRR; Appellants'

App. 127-128): twenty-eight racing forms with contents similar to those in Government's Exhibit 111, and which forms were contained in a box marked as Government's Exhibit 112; also, paid telephone bills, and cash.

It was stipulated by the Government (Appellants' App. 41-42) that the records so seized or information obtained from said records were subsequently presented to a Grand Jury for the Eastern District of Illinois, which returned an Indictment against the Petitioners charging them with violations of Sec. 1001, Title 18 (making false statements to Internal Revenue Agents); Sec. 7201 of Title 26 (attempting to evade the payment of the 10% wagering tax); and, Sec. 371 of Title 18 (conspiring to evade the payment of the 10% wagering tax) (Appellants' App. 24-32).

Petitioners filed motions for the return of property and to suppress evidence on the ground, among others, that the property seized were the private books and records of the Petitioners and protected by the Fourth and Fifth Amendments to the Constitution of the United States (Appellants' App. 36-40). These motions were denied. During the trial, these records were admitted into evidence over the objections of the Petitioners on the ground, among others, that these were private books and papers and protected by the Fourth and Fifth Amendments. Objections were overruled and these records formed a basis for the calculations of Internal Revenue Agent Martin Mochel as to the tax allegedly evaded by these Petitioners (Appellants' App. 144-148), and were introduced by the Government to prove the correct amount of wagering tax due by the Petitioners.

In affirming the conviction in the trial court, the court below held that the books and records of the Petitioners were not protected against search and seizure under the provisions of the Fourth and Fifth Amendments because:

(A) They were "a part of the outfit or equipment actually used to commit an offense" (App. p. 41); and

(B) They came within the "required records exception" because the records concerning the operation of the wagering business were required to be kept by law, and were, therefore, not "private papers" (App. pp. 41-42).

During the trial, government agents, Ira L. Minton (Appellants' App. 96-99), Wilbur Buescher (Appellants' App. 99-104), Frank Hudak (Appellants' App. 104-108), Norman Mueller (Appellants' App. 109-111), and Martin O. Mochel (Appellants' App. 142-150), testified on behalf of the government. After the conclusion of the testimony on direct examination, a demand was made by the defense for any statements and reports which related to the subject matter of the testimony of the witnesses Ira L. Minton (Appellants' App. 97-99); Wilbur Buescher (Appellants' App. 101-102); Frank Hudak (Appellants' App. 106-107); and Norman Mueller (Appellants' App. 110-111). The trial judge refused to order the government to produce the statements or memoranda either made by them or adopted by them, unless the statements and memoranda were made contemporaneously with the transaction they reported. The court below (App. 48-49) held that ordering the production of statements was discretionary with the court and then further held that the reports and memoranda demanded were not statements within the meaning of the statute, Title 18, Sec. 3500 (e).

Each Government Agent who was a witness testified that the memorandum or report prepared by him pertained to the subject matter of his testimony on the stand, and that he was present at the interviews or occurrence, which was the subject matter of his report. The court below held that the trial court had committed no abuse of discretion

in refusing to require the production of the memoranda prepared by the witnesses after the interviews had been completed "particularly since parts of the memoranda were based upon the notes and interpretations of other agents". This statement of the court below could have only referred to the report prepared jointly by Internal Revenue Agents Buescher and Mochel, and Agent Buescher testified that he was present with Mochel at the time of the interview; sat to the left of Mochel who made the notes; agreed with the notes made by Mochel; and that they went to the Internal Revenue Office after the interview and prepared a memorandum of the interview which Buescher signed (Appellants' App. 99-102).

Although the court below affirmed the trial court, Justice Schnackenberg in a concurring opinion stated:

"The failure of the trial judge to require the production by the government of the memoranda prepared by certain government witnesses presents a difficult question on this appeal. However, I am not convinced that Judge Steckler's holding on that subject is wrong.

"The language in the cases which he cites lends considerable support to his conclusion" (App. p. 54).

REASONS FOR GRANTING THE WRIT.

1. It is respectfully submitted that the decision of the court below is patently erroneous and misstates a fundamental concept concerning the protection of the Fourth and Fifth Amendments to the private books and records of an individual as clearly stated by this court in **Boyd v. U. S.**, 116 U. S. 616.

This case is of very great importance because the Court of Appeals, by its decision in this case, authorizes the sei-

zure of private books and records of a taxpayer engaged in a business, legal under Federal law, for use as evidence in a criminal prosecution, if said books would prove that the taxpayer had attempted to evade the payment of any tax imposed by the Internal Revenue laws, on the ground that the books and records were the instrumentalities for the commission of a crime. This principle could be applied to every case in which the private books and records of a taxpayer were seized, and used in evidence against him, to prove that he had attempted to evade the payment of any Federal tax. Therefore, the issuance of a Writ of Certiorari is important to all persons who are engaged in business in the United States, and who pay a tax of any kind on transactions which are reflected by their books and records, because this problem could arise in all tax cases, and the decision in this case has great importance to the public as a whole.

The court below in its opinion cited two reasons why the protection of the Fourth and Fifth Amendments were not available to these Petitioners. In the first instance, they said that the books and records of the Petitioners had been used by them to conduct the wagering business, and, therefore, constituted "part of the outfit or equipment used to commit an offense"; and, secondly, they held that since the Petitioners were required to keep books and records reflecting the amount of wagers received by them, that these records then lost their status as private books and records and became public records.

The Petitioners are admittedly gamblers: They have already pointed out that at the time their books and records were seized on May 6, 1957, that they had filed their application for registry-wagering; paid the special \$50.00 tax due; received a wagering stamp; and had filed monthly reports of wagers and had paid the 10% tax reported to be due thereon (Appendix p. 40). Under these circum-

stances, it is clear that the Petitioners committed no federal crime by engaging in the wagering business.

Congress has not prohibited ~~or~~ regulated the wagering business. Indeed, the "statute was passed and its constitutionality was upheld, as a revenue measure".¹ The record keeping requirements are solely for the purpose of implementing the processes of the collection of the tax so imposed. Consequently, since the books and records of the Petitioners were used by them to conduct a wagering business, they were, it is admitted, instrumentalities for conducting said business. However, the Petitioners were not prosecuted and convicted of engaging in the wagering business. They were indicted and convicted of attempting to evade and defeat the payment of the wagering tax (i. e., a 10% tax due on wagers accepted by them). Therefore, if the Petitioners did not report the correct amount of wagers accepted by them or pay the correct amount of tax on these wagers, the instrumentalities for the commission of that crime would be the monthly returns filed by the Petitioners which supplied allegedly false information. Thus, this case falls within the principle enunciated by the case of **Takahashi v. U. S.**, 143 F. 2d 118, as to what papers constituted the instrumentalities for the commission of the offense of making false statements to the government. Therefore, the private books and records of these Petitioners were not the instrumentalities for the commission of a crime of attempting to evade the payment of wagering taxes. In fact, the Government introduced the private books and records of these Petitioners to prove the amount of wagering tax allegedly owed by them.

An examination of the decisions of this court fails to reveal any authority for seizing the private books and

¹ United States v. Calamaro, 354 U. S. 351, 358.

records of a taxpayer, who is engaged in business which the United States Government does not prohibit. The only authority from the decisions of this court which authorizes the seizure of books and records as instrumentalities for the commission of a crime are those decisions which authorize the seizure of books and records of an individual engaged in a business which the Federal Government prohibited. These cases involve violations of the National Prohibition Act,² the smuggling of taxable items into this country,³ operation of a narcotics business or operation of a counterfeiting business. The court authorized the seizure of the books and records of these businesses on the ground that it is unlawful to possess liquor, narcotics, smuggled goods and counterfeit, and that, therefore, the possession of these items was unlawful and constituted contraband, and the books and records of said businesses were treated the same as contraband. Thus, the court below in effect held that the books and records of the Petitioners were contraband, which is obviously not true, since they had engaged in the wagering business with the full knowledge and consent of the Federal Government which had issued them a wagering stamp for that purpose.

Thus, from what has been stated above, this case raises an important search and seizure question. The Court of Appeals has interpreted the following language of Rule 41 (b) of the Federal Rules of Criminal Procedure to permit the seizure of the books and records of the Petitioners in this cause, to-wit:

“(b) Grounds for issuance. A warrant may be issued under this rule to search for and seize any prop-

² U. S. v. Lefkowitz, 285 U. S. 452; Marron v. U. S., 275 U. S. 192.

³ Landau v. U. S., 82 F. 2d 285.

erty. . . . 2. designed or intended for use or which is or has been used as the **means** of committing a criminal offense;"

The court below in its Opinion (Appendix 41) held that the books and records of the petitioners were "a part of the outfit or equipment actually used to commit an offense", and on this basis they authorized the seizure of the books and records of the petitioners used by them in operating the wagering business, and seemed to distinguish between evidence of a crime which had been committed or one which was to be committed in the future when the court said "in other words, evidence of crime or *malum in futuro*". The court seemed to indicate by this language that only evidence of an intent to commit a crime in the future was protected by the Fourth and Fifth Amendments. Petitioners submit that this is obviously an incorrect interpretation since the Amendments were enacted to prevent an individual from giving incriminating testimony against himself of the commission of a crime and this, of course, infers that a crime has in fact been committed.⁴ The court below in its narrow construction would allow a defendant to claim the protection of the Fifth Amendment only as to matters of an intention to commit a crime in the future, and would not safeguard him against giving testimony against himself of crimes he had in fact committed in the past.

2. The second important point relied upon by these Petitioners as to why this court should grant a Writ of Certiorari, involves the question as to whether or not the books and records of the defendants in this case come within the "required records exception" (App. 42). Since all persons engaged in a taxable business are required to keep

⁴ United States v. Kahriger, 345 U. S. 22.

records for the purpose of determining the correct amount of income tax due, this case then is important to every person who maintains records as to the profit and loss from his business, if said records are required to be kept by any law of the United States. This is so because under the authority of the Court of Appeals in this case every record required to be kept by law is included in the "required records exception" and, therefore, all such private books and records are excluded from the constitutional protection of the Fourth and Fifth Amendments.

As the principal authority for this holding, the Court below relied on **Shapiro v. United States**, 335 U. S. 1. However Petitioners contend that the **Shapiro** case is authority for only one proposition and that is that the books and records required to be kept under the provisions of the Emergency Price Control Act were subject to seizure, and for no other proposition. The holding in that case is certainly not authority for the proposition that any records required to be kept by any law of the United States are subject to search and seizure and production as evidence in a criminal prosecution.

The only purpose for the government requiring that the books and records be kept by a person engaged in a wagering business was to determine the correct amount of tax due, and not for the purpose of regulation which the government had no right to do. Therefore, the public as a whole had no interest in these records.

This case is similar to an income tax case since the taxpayer, by law, must keep records as to his transactions in order to determine the correct amount of tax due, but it has never been suggested by the Government that the records of every business man are "public records." From the decision of the court below, one may logically reason that all records required to be kept by law are "required

records" and thus not protected by the Fourth and Fifth Amendments of the Constitution, which obviously is not so.

The court below has held (App. p. 41) that since Title 26, U. S. C., Sections 4403 (App. 20), 4423 (App. 20), 6001 (App. 20), and Internal Revenue Regulation 325.32 (App. 22) require records to be kept by Petitioners which are subject to the right of inspection by Government agents that these records are subject to seizure. This is not true and the court said in the recent case of **Abel v. U. S.**, 80 S. Ct. 683, at page 695:

"We have held in this regard that not every item may be seized which is properly inspectable by the Government in the course of a legal search; for example, private papers desired by the government merely for use as evidence may not be seized, no matter how lawful the search which discovers them. **Gouled v. U. S.**, 255 U. S. 298, 310, 41 S. Ct. 261, 265, 65 L. Ed. 647."

Thus the requirement to maintain records and to keep them available for government inspection does not in itself make such records "public records."

3. The decision of the court below in holding that the Petitioners were not entitled on demand after government agents had testified on behalf of the government to have the statements, memoranda or reports of government agents prepared by them relating to the subject matter of their testimony (App. 48-49), finds no valid support in the law and is directly contrary to the decision in three other circuits.

In **U. S. v. O'Connor** (2nd Cir.), 273 F. 2d 358, the district court refused to allow the defendant's reports of government agents who testified as witnesses. In reversing the Appellate Court held:

agent's reports relating to O'Connor's assets, income and expenditures, whether prepared for criminal or civil tax purposes, were necessary to defendant's preparation and conduct of his defense in two respects, to determine whether any statement or fact therein were inconsistent with or contradictory to testimony on the stand of the **makers of the reports**.

Point one as to production, so far as it concerns the agent's report, is well taken under the Jencks rule. . . . The so-called Jencks statute, Public Law 85269, September 2, 1957, 71 Statute 595, 18 U. S. C., Sec. 3500, would now require the production on trial in the circumstances of this case."

In **U. S. v. Holmes** (4th Cir.), 271 F. 2d 635, one of the main witnesses for the government was an FBI agent who testified at length about his investigation and about conversations he had with the defendants. Defense demanded the production of the memorandum and reports prepared by the agent during his investigation and recording its results. The District Court ordered the United States Attorney to turn over the pertinent portions of the file, but allowed the District Attorney to determine what was pertinent. The government then on appeal asserted that the Jencks Act did not apply to statements prepared by a government agent who became a witness at the trial—the exact situation we have in the instant case. The Court of Appeals in overruling this contention held:

"The written report of the agent, however, is just as much a verbatim statement of the agent who prepares it, as a written statement of an informer, incorporated in the report, is the statement of the informer. It is a statement within the literal and evident meaning of subsection (c) of the Act. Its use to contradict the agent who prepared it in no way contravenes the policy of the Act against the

use of an investigator's notes or summaries of information to contradict his informer."

In **U. S. v. Prince** (3rd Cir.), 264 F. 2d 850, a government narcotics agent testified, and after his testimony any reports or statements made by him were demanded. One was given, the other was not. The lower court held that there was no resulting prejudice in the failure to make available the relevant portions of the FBI agent's report, but the Appellate Court said in 264 F. 2d at 852:

"In our view the mandate of the statute, itself, makes the omission substantial. It is not the function of the district court or ourselves to determine whether the appellant was prejudiced by failure to make available the relevant portions of the prior report of the witness. **Bergman v. United States** (6 Cir.) 1958; 253 F. 2d 933, 935, 936."

The court below cited as its authority to sustain its ruling that the memoranda and reports were not statements within the meaning of the act, **Johnson v. U. S.**, 269 F. 2d 72 (Case actually reverses lower court on other grounds); **Borges v. U. S.**, 270 F. 2d 332; **Papworth v. U. S.**, 256 F. 2d 125. In the Johnson case, supra, it is impossible to determine from the reported decision whether or not the testimony of the FBI agent on the stand was also contained in the statements and reports demanded by the defendants. Apparently, it was not since the court held that this particular memorandum merely contained interpretations and impressions and had no impeachment value. Insofar as it stands for this principle, the Johnson case is directly in conflict with **Jencks v. U. S.**, 353 U. S. 657 and **Rosenberg v. U. S.**, 360 U. S. 367, in that this court has held in both cases that it is impossible for a judge to be fully aware of all the possibilities for impeachment inhering in a prior statement of a government witness.

The Petitioners in the instant case requested the statements and reports of the government agents, witnesses who testified, for the sole purpose of determining whether the transaction related in the memorandums or reports were consistent with the testimony of the agents on the stand. It is difficult to see a clearer set of facts for the application of Title 18, Sec. 3500, Subsection (e), Paragraph 1.

In **Borges v. U. S.**, 270 F. 2d 332, a demand was made for a summary of an agent made a month after the interview of a witness. The demand was made obviously not to impeach the government agent, but to impeach the other witness who had previously testified. The court said that a summary of an interview made a month after the interview could not be considered a verbatim statement of the witness. This case, however, does not stand for the proposition that the summary could not be used to impeach the agent who prepared it.

In the Papworth case, supra, a demand was made for the agent's reports after the informer had finished testifying. The court merely held that the agent's report was not a substantial verbatim recital of the informer's testimony. The Papworth case and Borges case, supra, merely anticipated the decision of the Supreme Court in **Palermo v. U. S.**, 360 U. S. 343, and they arose out of a similar set of facts. In the Palermo case, the defendants were demanding the memoranda and reports from the government in order to try to impeach a witness other than the agent who made the report. The court simply held that in keeping with the theory behind the Jencks statute it would be grossly unfair to allow the defendants to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations. The court held in the Palermo case merely

that the statements, memoranda and reports of the government could not be considered statements of the accountant so as to impeach the accountant. In the instant case the government agents had testified and admitted that they had written reports relating to the testimony they had just given under direct examination (Appellants' App., p. 97, Ira L. Minton and Wilbur Buescher, p. 102). The memoranda and reports demanded fell directly without any dispute into the definition of Title 18, Sec. 3500, Subsection (e), Paragraph 1.

It is respectfully submitted that the court below completely ignored the definition of a statement in Title 18, Sec. 3500, Subsection (e), U. S. C., and that the court did some "legislative chiseling," a process that Judge Schnackenberg stated during oral argument in the instant case when argued below would be necessary if the government's position was to be sustained. These Petitioners are at a loss to know exactly what "legislative chiseling" is, but its net effect has been to deprive these petitioners of their absolute rights under the statutes, and what is probably even more important to deprive all defendants, similarly situated as these Petitioners were here, of any advantage they could have derived from the Jencks statute.

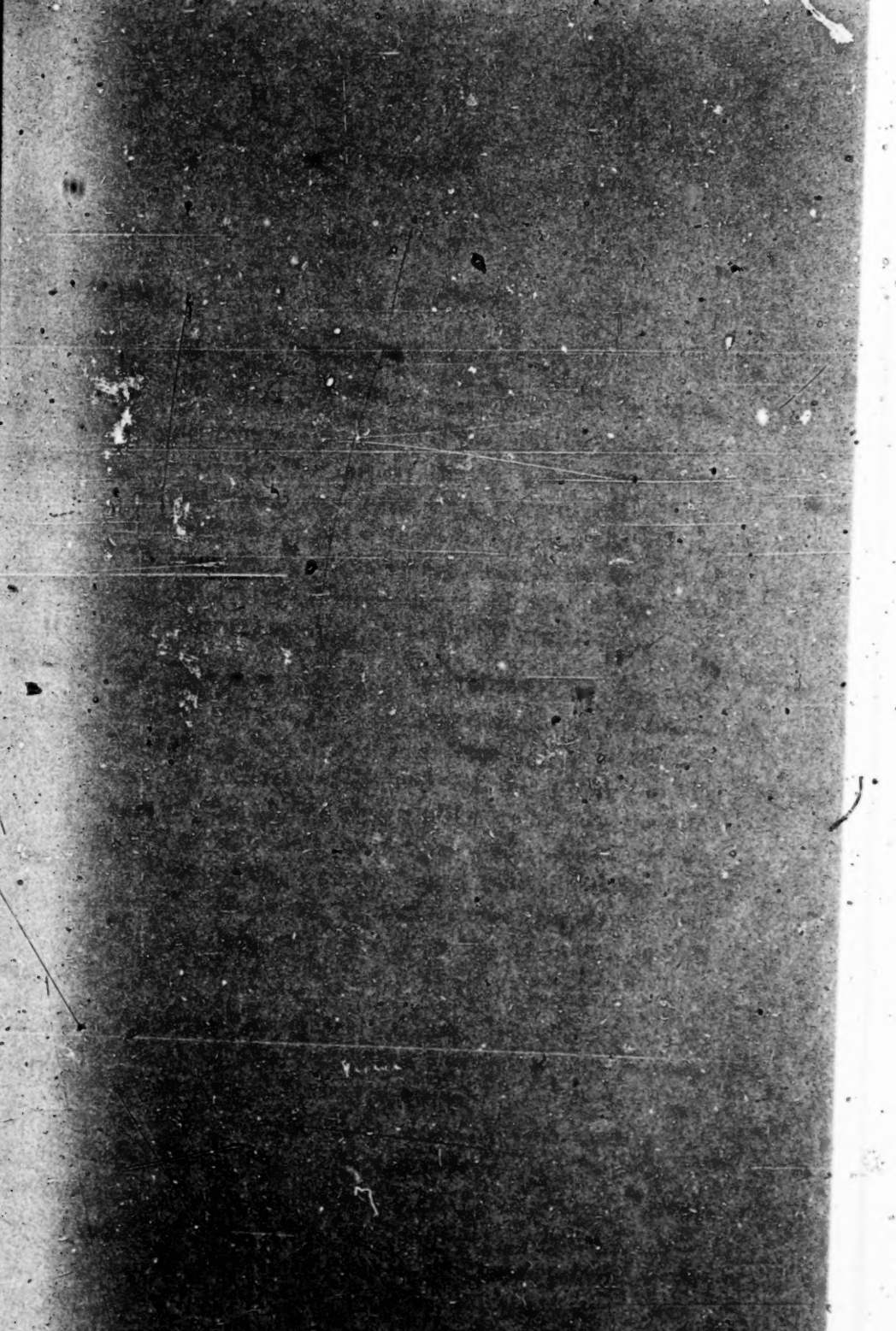
CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL P. WALLER, JR.,

JOHN F. O'CONNELL,
214 Murphy Building,
234 Collinsville Avenue,
East St. Louis, Illinois,
Counsel for Petitioners.



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APPENDIX A.

STATUTES.

Title 18, U. S. C., Sec. 3500 (a) (b) and (e).

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(e) The term "statement" as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made

by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Sept. 2, 1957, Pub. L. 85-269, 71 Stat. 596.

Chapter 35—Taxes on Wagering.

Subchapter A—Tax on Wagers.

Title 26, U. S. C., Sec. 4403. Record requirements. Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to Section 6001 (a); Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 525.

Chapter 35—Taxes on Wagering.

Subchapter C—Miscellaneous Provisions.

Title 26, U. S. C., Sec. 4423. Inspection of Books. Notwithstanding Section 7605 (b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 528.

Chapter 61—Information and Return.

Subchapter A—Returns and Records.

Title 26, U. S. C., Sec. 6001. Notice or regulations requiring records, statements and special returns. Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require

any person, by notice served upon such person or by regulation, to make such returns, render such statements, or keep such records as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title. Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 731.

Chapter 78—Discovery of Liability and Enforcement of Title.

Title 26, U. S. C., Sec. 7605 Time and place of examination.

(b) Restrictions on examination of taxpayer. No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of accounts shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

Federal Rules of Criminal Procedure 41. (a), (b).

Rule 41. Search and Seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designated or intended for use or which is or has been used as the means of committing a criminal offense.

Internal Revenue Regulations.

Reg. 132, Sec. 325.32. Records.—(a) In general—(1) Every person required to pay the excise tax imposed by section 3285 shall keep, or cause to be kept, at his office or principal place of business, or, if he has no office or principal place of business, at his residence or some other convenient office or safe location, such records as will clearly show as to each day's operation:

(A) The gross amount of all wagers accepted;

(b) Period for retaining records.—The records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the tax became due. (Reg. 132, Sec. 325.32.)

Amendments to the Constitution of United States.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, . . .

APPENDIX B.

OPINION AND JUDGMENT.

Opinion.

In the
United States Court of Appeals
For the Seventh Circuit

September Term, 1959—January Session, 1960

No. 12815

United States of America,
Plaintiff-Appellee,
v.

Thomas D. Clancy,
James F. Prindable and
Donald Kastner,
Defendants-Appellants.

} Appeal from the
United States Dis-
trict Court for the
Eastern District of
Illinois.

March 24, 1960

Before Hastings, Chief Judge, and Schnackenberg, Cir-
cuit Judges, and Steckler, District Judge.

Steckler, District Judge. Thomas D. Clancy and James
F. Prindable, two of the named defendants, were convicted
in the district court of making a false statement of a
material fact to agents of the United States Treasury
Department, Internal Revenue Service, in violation of 18

U. S. C., § 1001; of willfully attempting to evade a substantial amount of wagering excise taxes due and owing by virtue of Chapter 35, subchapter A of the Internal Revenue Code of 1954 (26 U. S. C., § 4401), in violation of 26 U. S. C., § 7201; and of conspiring to violate that subchapter, in violation of 18 U. S. C., § 371. Donald Kastner, the other defendant, was convicted on the latter two counts, but was found not guilty of the false statement count. Trial was by jury.

Defendants raise numerous points on appeal, all of which can be classified under the following broad headings:

1. The legality of the search and seizure of defendants' books and records.

2. Whether the district court erred in overruling defendants' motions to dismiss the indictment on the grounds that the grand and petit juries were illegally drawn and constituted.

3. Whether the court committed reversible error in refusing to ask certain questions on the *voir dire* examination of petit jurors.

4. Whether the court erred in admitting certain exhibits into evidence, and in admitting testimony as to statements of individual defendants without cautionary instructions to the jury.

5. Whether the court erred in refusing to order the production of reports of federal agents for use by the defendants during cross-examination, pursuant to 18 U. S. C., § 3500.

6. Whether the court erred in refusing to order acquittal both before and after the verdict.

7. Whether the court erred in instructing the jury and in refusing to give certain instructions tendered by defendants.

8. Whether the court erred in refusing to grant a new trial after hearing evidence of possible misconduct on the part of a petit juror.

In order to resolve these issues, a somewhat detailed analysis of the record is essential.

There is evidence in the record that the defendants, Thomas D. Clancy, James F. Prindable and Donald Kastner, were partners in the North Sales Company, and as such were engaged in accepting wagers, principally on horse races, in East St. Louis, Illinois. The defendants, doing business as the North Sales Company, by Thomas Clancy, applied for and received the special tax stamp for the fiscal year ending June 30, 1957, as required by 26 U. S. C., § 4411. In the special tax return and application for registry-wagering, the business address of the company was designated "at Large—2401 Ridge Ave.—E. St. Louis, Ill." However, when the application was produced at the trial by a government witness, the words "at Large" had been penciled through.¹ The defendants filed monthly tax returns of wagers accepted by them and paid the tax reported to be due thereon to the District Director of Internal Revenue at Springfield, Illinois. Defendants received a letter from H. J. White, District Director, dated April 17, 1957, which informed them that a recent examination of their tax liability for the years January, 1955, through December, 1956, indicated that no change was necessary to the tax reported and that the returns would be accepted as filed.

The record indicates that during March, April, and early May of 1957, federal agents of the Internal Revenue

¹ The government witness, Joseph M. Heckelbech, Chief of the Collection Division of the District Director's Office, could not say when the words "at Large" had been stricken out. However, witness Waller, the defendants' bookkeeper, testified that the words "at Large" were not stricken out when he filed the application; that the application was not returned to him as being incorrect; and that the stamp had been issued pursuant to the application.

Service observed activities which lead them to believe that a gambling operation was being conducted on the premises located at 2300 and 2300A State Street, East St. Louis, Illinois. The first floor of the premises was occupied by a business known as "Zittel's Tavern," and the second floor, 2300A, was an apartment. According to the affidavit for search warrant, Agent Johnson placed wagers with "Heine" and "Murphy" at Zittel's Tavern, the latter being a bartender there, and observed Heine walk to a doorway behind the bar which leads upstairs over the men's toilet and place money envelopes in a stairwell area and close the door. Heine later picked up an envelope from behind the door which contained Agent Johnson's winnings from a prior bet. Johnson also observed scratch sheets, racing forms, money and 4-inch by 6-inch paper pads on the bar, back bar, under the bar, on tables, in the stairwell and in the safe. Agent Muellér observed a man carrying a sack, similar to sacks furnished by banks to carry money, enter the tavern, speak to Murphy, the bartender, and go behind the bar and through a door which leads upstairs. Agent Yerly observed Charles J. Kastner, Jr., brother of the defendant Donald Kastner, and the defendant Prindable, both well known bookmakers, enter Zittel's Tavern at 7:09 and 7:17 a. m., respectively, on May 1, 1957. Agent Ryan entered the tavern shortly after Charles J. Kastner, Jr., on that morning and saw Prindable enter and go behind the bar and through a door that leads upstairs. Agent Buescher interviewed two well known bookmakers in Collinsville, Illinois, and was told by them that they picked up horse bets and ordinarily received telephone bets at Blaha's Tavern in Collinsville. Agent Busch examined a transcript of toll calls pertaining to Blaha's Tavern, using Illinois Bell Telephone records, and established that between August 11, 1956, and January 25, 1957, twenty-one (21) telephone calls were made between Blaha's Tavern

and 2300A State Street, East St. Louis. The telephone at 2300A State Street was subscribed to by one John Leppy. Agent Yerly examined the application for the occupational tax stamp of Charles J. Kastner, Jr., and Prindable, which stated that their business address was 2401 Ridge Avenue.² Joseph M. Heckelbech, Chief of the Collection Division in the office of the District Director at Springfield, examined the records in his custody and determined that no gambling stamp had been issued to John Leppy, Henry D. Zittel, or any other person at 2300A State Street; and that no wagering excise tax returns had been filed by anyone at that address.

Upon this evidence, Agent Johnson applied to the district court for two search warrants, one for the first floor, and the other for the second floor of the building at 2300 and 2300A State Street. (Here on appeal we are concerned only with the search of the second floor, 2300A.) The part the other agents performed in the investigation was set forth in their separate affidavits which were, by reference, made a part of the Agent Johnson's affidavit for the search warrant for the second floor. In addition, Agent Edwards corroborated much of the statement of Agent Yerly. The affidavit of Agent Johnson for the search warrant for the second floor states, in part, that he is positive the premises

" . . . are being used in the conduct and carrying on of a 'Wagering Business,' . . . against the laws of the United States, that is to say, the offense of wilfully attempting to evade and defeat a tax imposed by the Internal Revenue Laws . . . and the payment thereof, to wit, the special tax of \$50 a year to be paid by each person engaged in the business of accepting wagers . . . ; and the offense of wilfully fail-

² This address was actually the residence of defendant Clarke, which appeared after the "at Large" designation had been penciled

ing to prepare and file with the district Director . . . the Special Tax Return and Application for Registry-Wagering (Form 11-C) . . . in the name of the operator of said business, namely, one John Doe. . . ."

The district court, satisfied that there was probable cause to believe that a wagering business was being conducted on the premises described in violation of the said laws of the United States, issued the search warrants requested on May 5, 1957. The second floor warrant was addressed to "any Special Agent of the Intelligence Division of the Internal Revenue Service of the United States of America," and authorized the seizure of:

" . . . divers records to wit books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons . . . and divers other tools, instruments, apparatus, United States currency and records"

* On May 6, 1957, Agent Kienzler, accompanied by several other agents, executed the second floor search warrant and seized defendants' notes, books and records, currency in excess of \$2,160, racing forms, scratch sheets, telephone bills, a check book, and several metal boxes. Defendant Donald Kastner was present in the apartment when the search was made and informed the agents that he, Clancy, and Prindable were partners in the North Sales Company and that the partnership had a tax stamp, which Clancy took care of. Agent Kienzler testified that he did not personally determine at that time whether the North Sales Company actually had a tax stamp, but obeyed the com-

mand of the warrant in searching and seizing the items described. Apparently no arrests were made at the time of the raid.

Subsequently, information obtained from the seized records was presented to a grand jury which, on July 25, 1957, returned a five-count indictment against the defendants. The first three counts charged Clancy, Kastner and Prindable severally with making false statements to agents of the Internal Revenue Service in violation of 18 U. S. C., § 1001.³ Count IV charged each defendant with an attempt to evade a substantial amount of wagering excise tax during the fiscal year ending June 30, 1957. In support of this count specific unlawful acts were alleged.⁴ Count V was the conspiracy count and alleged substantially the same acts as Count IV.

The defendants pleaded not guilty on July 30, 1957, and on August 14th following, filed a joint motion to dis-

³ In Count I, Clancy was charged with making a false statement to Agents Mochel and Buescher on December 13, 1956, when he stated that the North Sales Company had no employees or agents accepting bets other than Charles J. Kastner, Jr., and Malcolm Wagstaff. In Count II, Kastner was charged with making a false statement to Agent Kienzler on May 6, 1957, the day of the raid, by stating that he did not know the names of individuals accepting wagers as agents of the North Sales Company. In Count III, Prindable was charged with making a false statement to Agents Mochel and Buescher on December 14, 1956, when he stated that he did not know any other horse bookies except himself, Clancy and Donald Kastner.

⁴ In substance it was alleged:

1. During March, 1957, defendants reported wagers of \$11,913.50, but actually received wagers in the amount of \$103,441.30.
2. Defendants kept false books and concealed the identity of agents.
3. Defendants concealed and withheld records, sources of income, and lists of agents.
4. Defendants maintained secret places of doing business.
5. All three defendants made false statements to government agents.

miss the indictment and a motion for return of property and to suppress evidence. As far as relevant here, the motion to dismiss was based upon an allegation that the members of the grand jury were not "selected, drawn or summoned according to law." The motion to suppress attacked the affidavit of Agent Johnson as based on hearsay; the warrant's description of the articles to be seized as too general; the existence of probable cause; and the seizure of allegedly private books and papers. Defendants also filed a motion to inspect the transcript of evidence and record of the foreman of the grand jury.

In an entry dated July 25, 1958, the district court denied all three of the above motions. The court held, *inter alia*, that the charges in respect to the grand jury were mere "naked allegations"; that probable cause did exist; and that the items seized were specifically described in the warrant and were not private books or papers, but rather "property used in the commission of crime."

On May 8, 1959, defendants filed an amended motion to dismiss with an affidavit of the jury commissioner, Bohlen J. Carter, attached. In the affidavit the jury commissioner states that names of prospective jurors were solicited from various persons, including school superintendents. When the juries were drawn, he and the clerk, Douglas H. Reed, separately took a handful of cards from the box and sorted them according to the distance they lived from the place at which the grand and petit juries were to function, namely East St. Louis, Danville, Cairo, or Benton, Illinois. Only those thought to live within a reasonable distance would be selected.⁵ The other names would

⁵ In the affidavit Mr. Carter mentioned 50 to 60 miles as a "reasonable distance." In subsequent testimony in another proceeding, made a part of this record by an offer of proof by defendants, Mr. Carter corrected this statement by stating that the distance was actually 100 to 123 miles. Mr. Reed testified in this extraneous proceeding that the distance was approximately 150 miles.

be placed back in the box. Carter also stated that he did not know how many names were in the box, but estimated about 200 or possibly 400 to 500. Defendants complained that the grand jury was not selected according to law, 28 U. S. C., § 1864, and that it was not selected by chance, but by "whim and caprice."

The court denied the amended motion to dismiss on the grounds that the grand jury had been properly drawn; that even if there were irregularity, defendants had failed to show prejudice or the violation of any constitutional rights; and that the motion was filed too late according to local rules.

During the course of the trial, the court admitted the search warrant and return (Government Exhibit 29a) and the various records and articles seized in the raid (Government Exhibits 54 through 112) into evidence. Defendants objected on the basis of an illegal search and also on the ground that relevancy and materiality had not been shown. Agent Kienzler merely stated that these were the articles seized in the raid. Later, however, the chain of custody of the exhibits was established and Agent Mochel testified that he had used Exhibits 54 through 79 to determine that the total amount of bets actually placed with defendants in March, 1957, was \$103,441.30.

Defendants also objected to the admission into evidence generally of statements allegedly made by them individually to government agents. Defendants claim that such statements were admissible only as against the one making them, since a conspiracy had not yet been established, and, as to the statements of defendant Kastner, that any conspiracy, if it had existed, was terminated when the statements were made.

Agents Buescher and Mochel testified that they interviewed Clancy on December 13, 1956, in the office of Press

Waller. They testified that during the interview Clancy identified the other defendants as partners in the North Sales Company; stated that they had no particular place of business; and that they had only two agents. The agents also testified that Clancy stated that they did not use the telephone, but went from place to place accepting wagers. The statement made by Clancy during this interview with respect to not having any employees or agents, other than Charles J. Kastner, Jr., and Malcolm H. Wagstaff, was the basis of Count I of the indictment.

Agents Buescher and Mochel also testified that they had an interview on December 14, 1956, with Prindable in Waller's office, in the presence of Donald Kastner. In the interview, according to the testimony, Prindable stated that he paid off bettors in person and that he never "laid off" any bets. In answer to a question asking whether he could recommend another bookie to take a bet larger than he could handle, Prindable stated that he did not know of any other horse bookies except himself, Clancy and Donald Kastner. The latter statement was the basis of Count III of the indictment.

Agents Kienzler and Minton were permitted to testify to the substance of a conversation between Kienzler and the defendant Kastner at the time of the raid. According to the testimony, Kastner stated that he was a junior partner and clerk of the North Sales Company, answered the telephone and took bets. He worked on a commission basis. Kastner named the other two defendants as partners and stated that Clancy took care of the records and had the tax stamp. This interview was the basis of Count II of the indictment.

Supervisor Hudak and Agent Mueller testified to the substance of a second interview with Kastner in the offices of the United States Attorney in the Federal Building in East St. Louis, on July 23, 1957, two and one-half months

after the raid. According to their testimony, Kastner in this interview admitted taking bets by telephone at 2300A State Street and also at the residence of one Vernon Lampe. He explained in detail the manner in which bets were recorded and the business conducted. Kastner also named various "agents" who accepted bets for the North Sales Company, including Merlin Behnen, a tavern keeper, and Otto Pohlman; and described the arrangements had with the "agents," i. e., forty or fifty per cent bets, in which the "agents" received forty or fifty per cent of the profit and shared forty or fifty per cent of the loss, or five per cent bets, in which the agents received five per cent of the gross amount of bets placed.

After Agent Buescher had testified to the interviews with Clancy and Prindable, the defendants on cross-examination established that Buescher had prepared, signed and submitted to his superior, Mochel, a written report pertaining to the substance of the interviews. The report was composed after Buescher had returned to his office. Buescher did not take longhand notes at the time of the interviews, but in preparing the report agreed with and used contemporaneous longhand notes taken by Agent Mochel. During the testimony of Agent Minton it was brought out that he made a similar report to his superiors, under like circumstances, following the conversation between Kienzler and Donald Kastner at the time of the raid on May 6, 1957.

Defendants demanded production of these reports for use during cross-examination under the provisions of the so-called "Jencks Act." 18 U. S. C., § 3500. The district court denied the requests on the ground that the reports were not made contemporaneously with the interviews, but subsequent thereto. However, the court did require the Government to turn over to the defendants for inspection after direct examination, the longhand notes taken at the

time of the interviews by the agents. Thus, defendants received the notes taken by Agent Mochel during the interviews with Clancy and Prindable in December, 1956, and the notes taken by Supervisor Hudak and Agent Mueller during the interview with Kastner in the Federal Building on July 23, 1957. Defendants made no request for any notes taken by Agent Kienzler during the May 6, 1957, conversation with Kastner.

The defense called no witnesses, but attempted to develop a theory of defense by cross-examination of government witnesses and argument of counsel. As to the false statement count against Clancy, the defense theory apparently was that the individual bet takers, other than Charles J. Kastner, Jr., and Malcolm Wagstaff, were "independent contractors," rather than "agents." The statement of Prindable, that he did not know any other horse bookies, according to defense counsel, was not false when considered in context. The agents had asked him if he could recommend any other book to take a bet larger than he could handle. His reply, under the circumstances, it is asserted, meant that he did not know any other horse book that would take bets larger than he. The principal theory as to Counts IV and V was apparently that the excess of bets, not reported, represented "lay-off" bets from other bookies. The defendants allegedly did not know that they were required to report these bets as part of the gross bets received. Defendants also argue that all of the evidence as to willfulness applied only to Clancy, who actually had charge of the books and records.

The trial court overruled defendants' motion for acquittal and submitted the case to the jury. The defendants tendered certain instructions, which the court refused to give, and to this, the defendants complain that the court failed to properly instruct the jury on their theory of the case. Defendants also objected to certain of the court's

instructions as not supported by the evidence, as being misleading and confusing to the jury, and as not containing all the elements of the crimes charged.

Subsequently, defendants filed motions for acquittal notwithstanding the verdict and for a new trial. One of the grounds urged in support of the latter motion was that a petit juror who served in the case had stated privately to another prospective juror that he was prejudiced against anyone who accepted wagers; but on voir dire stated that he was not so prejudiced. In support of this allegation, defendants called one Mrs. Vera Simmons, an original member of the jury panel, who testified that a male juror sitting next to her stated privately that he felt the same as she did, after Mrs. Simmons acknowledged prejudice against gamblers to the court and was excused for cause. Mrs. Simmons could not remember the juror's name, on which side of her he sat, or whether he had actually served on the petit jury. One of defendants' counsel, Paul P. Waller, Jr., asked permission to testify as to the seating arrangement of the jury panel, and offered to prove that the male jurors sitting on both sides of Mrs. Simmons did in fact serve on the petit jury, and that one of them, Clinton Beinfohr, served as the foreman of the jury. The court denied permission to testify, unless Mr. Waller would withdraw from the case. Mr. Waller refused to withdraw, and his testimony was not heard.

The court denied the motions for judgment of acquittal notwithstanding the verdict and for a new trial. In regard to the misconduct of juror issue, the court stated that the testimony of Mrs. Simmons absolutely failed to substantiate the allegations of misconduct on the part of a juror who actually served. Further, the court stated that the defendants' counsel had reported the matter to the court in a conversational manner in chambers during the trial. The court at that time advised counsel that there was

nothing before it on which to act. However, the defendants made no motion or request of any kind, but waited until after the verdicts of guilty had been returned before pursuing the matter fully. Under the circumstances, the district court concluded, defendants "failed to challenge the alleged prejudice of the juror in apt time."

The defendants' first major argument concerns the denial of the motion to suppress. In support of their argument, defendants attack the basis upon which the warrant was issued, the form of the warrant itself, and the nature of the articles seized pursuant thereto.

It seems paramount that we first determine whether there was probable cause to believe a crime was being committed at the premises to which the affidavits and search warrants were directed. Defendants say there was no probable cause and that the affidavits were invalid because based upon hearsay.

In determining whether probable cause exists for the issuance of a search warrant it need not be determined whether the offense charged has actually been committed; the only concern being whether the affiant has reasonable grounds, at the time of the making of the affidavit and the issuance of the warrant, for believing the law was being violated on the premises to be searched. **Dumbra v. United States**, 268 U. S. 435, 441 (1925); **Carney v. United States**, 163 F. 2d 784, 786 (9th Cir. 1947), cert. denied, 332 U. S. 824. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed. **Brinegar v. United States**, 338 U. S. 160, 175-176 (1949); **Dumbra v. United States**, supra.

It appears from the argument made by the defendants that they would have this court consider only their status

as licensed gamblers, and disregard the knowledge the agents had in respect to the activities taking place at the State Street address. They assume the warrant was issued for the express purpose of seizing their books and records, for they argue that since they had registered, received a wagering stamp, and paid some wagering taxes, there was no probable cause for seizure of their books. But, as pointed out by the Government, what defendants overlook by such argument is the fact that the warrant was not issued for the purpose of seizing **their** books. The warrant was directed to certain premises and ordered the seizure of property described therein. It did not order the seizure of defendants' property because it was not known at the time who was operating the wagering business at the address stated in the warrant. From the agents' observations there was probable cause to believe that a wagering activity was being operated in violation of the laws of the United States, especially since the premises had not been reported to the District Director as required by 26 U. S. C., § 4412.⁶ See **Merritt v. United States**, 249 F. 2d 19 (6th Cir. 1957).

The defendants' argument that the search warrant for the second floor of the building was invalid because issued upon affidavits based upon hearsay, is likewise without merit. A cursory examination of the affidavits upon which the warrant was issued, without regard to hearsay, and based only on the knowledge of the affiants from personal

⁶ "§ 4412. Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

- (1) his name and place of residence;
- (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf;

* * *

observations, clearly takes this case out of the ambit of the cases relied on by the defendants, i. e., **Sparks v. United States**, 90 F. 2d 61 (6th Cir. 1937); **Crank v. United States**, 61 F. 2d 981 (8th Cir. 1932); **Simmons v. United States**, 18 F. 2d 85 (8th Cir. 1927); **United States v. Clark**, 18 F. 2d 442 (D. Montana 1927); and **United States v. Lassoff**, 147 F. Supp. 944 (E. D. Ky. 1957).

As to the form of the search warrants, defendants state that they were void in that they were not directed to any particularly named person, but rather to a class; that the property to be seized was not capable of accurate determination, inasmuch as the words, "letters, tickets, papers, records and books," is not a sufficient description; that exploratory searches may not be made to look for evidence with or without a search warrant, and that an invalid search is not made lawful by what it brings to light.

By the terms of 18 U. S. C., § 3105, it is provided:

"A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

Although it would be a better practice to direct the search warrant to a particular officer by name, the statute does not require it. So long as the warrant is directed to civil officers of the United States authorized to enforce or assist in enforcing any law thereof, or otherwise authorized to serve such warrant, even though they are not specifically named, but identified, it is sufficient. Rule 41 (c), F. R. Cr. P., **Gandreau v. United States**, 300 Fed. 21, 25 (1st Cir. 1924); see **United States v. Smith**, 16 F. 2d 788, 789 (S. D. Fla. 1927); **United States v. Nestori**, 10 F. 2d 570, 571 (N. D. Cal. 1925); **Boehm v. United States**, 6 F. 2d

497, 498 (7th Cir. 1924); **United States v. Tolomeo**, 52 F. Supp. 737, 738 (W. D. Pa. 1943).

That the articles to be seized by virtue of the search warrant were described with sufficient particularity, can hardly be questioned in view of the authorities. **Nuckols v. United States**, 99 F. 2d 353, 355 (D. C. Cir. 1938), **cert. denied**, 305 U. S. 626; **Merritt v. United States**, 249 F. 2d 19 (6th Cir. 1957); see also, **Clay v. United States**, 246 F. 2d 298 (5th Cir. 1957), **cert. denied**, 355 U. S. 863.

In the **Nuckols** case, *supra*, a search warrant was held sufficient which commanded the seizure of “. . . gaming tables, gambling devices, race horse slips and gambling paraphernalia . . .” The court said, at page 355:

“In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods.”

And in **Merritt v. United States**, *supra*, at page 20, the court approved affidavits for a search warrant, and the search warrant; where the affidavits described only “. . . lottery tickets and other paraphernalia ‘which will indicate a numbers operation is being conducted on the premises.’ ”

As to the contention that the search was exploratory, in view of the evidence, and what we have heretofore set forth, we cannot agree that the search was merely exploratory.

The remaining point raised with respect to the motion to suppress is that the search and seizure was unreasonable and in contravention of defendants’ rights under the Fourth and Fifth Amendments to the Constitution, for the reason that **private** books, records, papers and documents are not subject to seizure, even under authority of a search warrant. This protection, they contend, extends to partner-

ship books and papers. Defendants make the point that the property seized, constituted, "at most, evidence and did not constitute the instrumentalities for the commission of a crime against the United States."

The basis of their argument is that they had filed an application for registry-wagering and had, in fact, obtained a wagering stamp for the period in question; had filed monthly reports and paid the full amount of the tax reported. Consequently, it is argued that the books and records were not "instrumentalities" of a crime against the United States, and therefore could not be seized except in contravention of their constitutional rights. Stated in another way, it is insisted that in so far as the federal laws were concerned, defendants were engaged in a legitimate enterprise, and, for that reason, the books, papers and records used in connection therewith were not contraband, but private papers, protected against seizure under the Fourth and Fifth Amendments. Defendants rely heavily upon **Takahashi v. United States**, 143 F. 2d 118 (9th Cir. 1944). In that case the defendants were charged with conspiracy, with violation of an executive order by designating China as the country of destination on an application for license to export certain new storage tanks when in fact Japan was the country of ultimate destination, and with causing false and fraudulent statements to be made in the application in a matter within the jurisdiction of the Department of State. Custom officers seized the documents in question, including code telegrams, letters, and other papers, indicating the true destination of the tanks was Japan. The court of appeals held that a motion to suppress should have been sustained and overruled the contention that the papers were more than mere evidence but were themselves the instrumentalities of a crime. The court in substance said that although the application for the license itself would be an instrumentality for the commission of a crime, the tanks themselves and

papers taken from the defendants were mere evidence of **an intention** on the part of the defendants to commit a crime under both of the substantive counts in the indictment. In other words, evidence of crime or *malum in futuro*. Specifically the court said, at page 124:

"The distinction must be drawn between papers which are a part of the outfit or equipment actually used to commit an offense such as the ledgers and bills used to maintain a nuisance exemplified by the situation developed in **Marron v. United States**, 275 U. S. 192, 199, 48 S. Ct. 74, 72 L. Ed. 231, and those papers which are simply evidences of intent, design or even of the agreement of the defendants."

Thus, the **Takahashi** case recognizes the rule that ledgers, bills and other types of books and records, may be the instrumentalities of a crime. We hold that gambling paraphernalia, such as that used by the defendants, when used in commission of a crime in violation of 26 U. S. C., § 7201, i. e., knowingly attempting to defeat and evade the wagering tax, becomes "a part of the outfit or equipment actually used to commit an offense," as mentioned in **Takahashi**, supra. See **Merritt v. United States**, supra; **Foley v. United States**, 64 F. 2d 1 (5th Cir. 1933), cert. denied. 289 U. S. 762; **Landau v. United States Attorney**, 82 F. 2d 285 (2d Cir. 1936).

Furthermore, there is good authority for holding that the books, records and papers seized in the case at bar were not such **private** papers as to be clothed with immunity from seizure and use against the defendants under the Fourth and Fifth Amendments. Under 26 U. S. C., §§ 4403, 4423, 6001, and United States Treasury Regulation 132, § 325.32, the defendants were required to keep books and records reflecting transactions carried on in the course of a taxable wagering activity. Such records were to be kept on a day-to-day basis and were required to be made

available for inspection by Internal Revenue officers at all times. In the case of **Boyd v. United States**, 116 U. S. 616 (1886), a case relied on by the defendants, the court stated, at 623-624:

"The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government . . .

As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures."

This exception to the privilege against self-incrimination and searches and seizures, has come to be known as the "required records exception," and has been recognized in numerous cases. **Shapiro v. United States**, 335 U. S. 1, 17-20, 32-33 (1948); **Davis v. United States**, 328 U. S. 582, 589-590 (1946); **Wilson v. United States**, 221 U. S. 361, 380 (1911); **Smith v. United States**, 236 F. 2d 260, 268 (8th Cir. 1956), cert. denied, 352 U. S. 909, rehearing denied, 353 U. S. 989; **Beard v. United States**, 222 F. 2d 84, 92-94 (4th Cir. 1955), cert. denied, 350 U. S. 846, rehearing denied, 350 U. S. 904. See also, Meltzer, **Required Records, The McCarran Act, and the Privilege Against Self-Incrimination**, 18 U. of Chi. L. Rev. 687 (1951).

In **Shapiro**, supra, at page 33, the court stated:

"... the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'"

In view of what has here been said, we conclude that the trial court committed no error in denying the defendants' motion to suppress.

We next take up the jury selection issue. We note that the original motion to dismiss did not specify any grounds and was not supported by competent evidence. Further, the amended motion to dismiss, at most, complained of mere irregularities and was filed too late according to the local rules of the district court.⁷

It is significant to note that the local rule is substantially the same as former Section 556 (a) of Title 18, U. S. C. That statute was discussed in **Wright v. United States**, 165 F. 2d 405, 407 (8th Cir. 1948). The court held that the right to challenge the grand jury panel was waived as the challenge was not seasonably presented in accordance with the ten-day limitation. In the recent case of

⁷ Rule 27, Rules of the United States District Court for the Eastern District of Illinois, provides:

"(1) A plea in abatement to an indictment directed against the legality of the grand jury returning said indictment shall not be entertained by the court unless the same shall have been filed within 10 days from the date of the return of the indictment; provided, however, that in the event the defendant has not been apprehended at the time the indictment is found such plea shall be filed within 10 days after his apprehension, unless he or his counsel shall sooner have been apprised of his indictment, in which case the plea shall be filed within 10 days after he or his counsel shall have been apprised of his indictment."

Scales v. United States, 260 F. 2d 21 (4th Cir. 1958), **rev'd on other grounds**, 355 U. S. 1, the court of appeals affirmed the district court's decision in refusing to entertain a motion challenging the grand jury. The decision was based upon Rule 12 of the Federal Rules of Criminal Procedure, inasmuch as the lower court had no rule comparable to Rule 27 of the lower court in this case. There the court noted, as in the instant case, the information upon which the motion was based was at all times available to the defendant. In that case the defendant was less than one year delinquent in making his motion, whereas here the defendants delayed almost twice that long. Most significant to us, however, is the defendants' failure to show any prejudice or the violation of any constitutional rights, either with respect to the grand jury, or the petit jury.

The defendants' motion to strike the array because of the alleged improper choosing and selection of the petit jury was filed after the jury had been selected. In their argument defendants cite **Ballard v. United States**, 329 U. S. 187 (1946), and **Glasser v. United States**, 315 U. S. 60 (1942). Those cases involved a systematic exclusion from the jury panel because of a particular sex or group. Nothing of the kind is involved in this case. In short, we find nothing wrong with the manner in which the prospective jurors' names were obtained. See **Local 36 of International Fishermen and Allied Workers of America v. United States**, 177 F. 2d 320, 341 (9th Cir. 1949); **Scales v. United States**, *supra*. Nor do we find material irregularity in the drawing of the names of those prospective jurors who were summoned for petit jury duty. **United States v. Gottfried**, 165 F. 2d 360, 364 (2d Cir. 1948), **cert. denied**, 333 U. S. 860, **rehearing denied**, 333 U. S. 883; **United States v. Skidmore**, 123 F. 2d 604, 607 (7th Cir. 1941).

Turning next to the alleged error in the court's conduct of the voir dire examination, it is well settled that such

examination is within the discretion of the trial judge, and the exercise of such discretion will not be disturbed on appeal in the absence of a clear showing of abuse. **United States v. Lebron**, 222 F. 2d 531, 536 (2d Cir. 1955), cert. denied, 350 U. S. 876; **Speak v. United States**, 161 F. 2d 562, 563 (10th Cir. 1947). The two tendered questions asked by the court were designed to uncover prejudice against gamblers and religious scruples against gambling. The other questions tendered were merely cumulative and argumentative." As to this issue we find no abuse of judicial discretion.

The trial court likewise has broad discretion in the order of admitting evidence at the trial. **United States v. Bender**, 218 F. 2d 869, 873 (7th Cir. 1955), cert. denied, 349 U. S. 920. Here the articles seized in the raid were relevant in the attempt to prove that the defendants were engaged in a wagering business and not paying the full amount of the required excise tax, a fact which the Government had to prove to secure a conviction on Counts IV and V of the indictment. Some of the exhibits were later used by Agent Mochel in support of his testimony that defendants received gross wagers in the amount of \$103,441.30, in March, 1957.

"2. Do you teach Sunday School?

"7. Would you be prejudiced against anyone who accepts wagers?"

"1. Do you believe that gambling itself is immoral, per se, or morally wrong?"

"3. To what denomination, if any, do you so teach?"

"4. We also ask the Court to ask the jurors if they can give these defendants a fair trial even though the evidence shows that the laws, gambling laws, of the State of Illinois were violated.

"5. Can you separate the violation of the law with which they are charged in the indictment, that is, the laws of the United States separate and apart from the violation of state laws?"

"6. Do you have a prejudice against people engaged in the business of operating horse books?"

The admission of the agents' testimony without cautionary limitation concerning the substance of the four interviews with the defendants was not, in our view, reversible error. Evidence of admissions of co-conspirators may be presented prior to the conclusive establishment of the conspiracy without commission of error so long as the conspiracy is established at some time during the course of the trial. **United States v. Sansone**, 231 F. 2d 887, 893 (2d Cir. 1956), **cert. denied**, 351 U. S. 987. Since the jury could conclude from all the evidence that a conspiracy had been conclusively established, there was no error in the admission of the evidence on that ground. It is likewise clear that the conspiracy, if any, had not terminated in December, 1956, the time of the interviews with Clancy and Prindable, and on March 7, 1957, the time of the first interview with Kastner. The second interview with Kastner, on July 23, 1957, presents a more difficult question. Although no arrests had been made up to that time, the defendants' gambling operation had been raided, and their books and records seized, some two and one-half months prior thereto. However, defendants were not subsequently charged with operating an illegal gambling business, but with attempting to evade a substantial amount of wagering excise tax. The district court could reasonably find that a conspiracy to violate 26 U. S. C., § 7201, had not terminated at the time of the July 23d interview. The usual criterion for determining the conclusion of a conspiracy is the arrest of the co-conspirators. **Sandez v. United States**, 239 F. 2d 239, 243 (9th Cir. 1956); **Cleaver v. United States**, 238 F. 2d 766, 769 (10th Cir. 1956). Cf. **Scarborough v. United States**, 232 F. 2d 412 (5th Cir. 1956). Moreover, even if the declarations of one co-conspirator are erroneously received as evidence against another co-conspirator, there is no reversible error if, as here, there is other competent evidence sufficient to prove the facts sought to be established by such declarations. **Massicot v. United**

States, 254 F. 2d 58, 64 (5th Cir. 1958); **Papadakis v. United States**, 208 F. 2d 945, 953 (9th Cir. 1953).

The next contested issue is whether the trial court erred in refusing to order the Government to produce the memoranda or reports of the government agents pursuant to the "Jencks" Act, 18 U. S. C., § 3500.¹⁰ Defendants rely on the decision in **Bergman v. United States**, 253 F. 2d 933 (6th Cir. 1958).

Since the "Jencks" Act was the direct outgrowth of the decision in **Jencks v. United States**, 353 U. S. 657 (1957), the statute must be read and interpreted in the light of that decision. **Palermo v. United States**, 360 U. S. 343, 345 (1959). "The Act's major concern is with limiting and

¹⁰ The pertinent parts of the statute read:

"§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

"(c) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." **Palermo v. United States**, *supra*, page 354.

We think there is a distinction between the type of case here at hand and those cases in which the Government produces as a witness an undercover agent whose dealings with the accused are the subject of the agent's testimony at the trial. Here the defendants were aware of the identity of the government agents at the time they made the statements which later furnished the basis of the prosecution against them. They were not dealing with undercover agents whose true identity they did not know. Cf. **Jencks v. United States**, *supra*; **Bradford v. United States**, 271 F. 2d 58 (9th Cir. 1959); **United States v. Prince**, 264 F. 2d 850 (3d Cir. 1959).

The final decision as to production must rest within the good sense and experience of the district judge guided by the standards as outlined by the Supreme Court,¹¹ and subject to the appropriately limited review of the appellate courts.

It is significant to note, that at the request of defendants' counsel the court required the Government to turn over to the defense, for use in cross-examination, the long-hand notes taken at the time of the interviews. In view of this, we are unwilling to agree that there was an abuse

¹¹ The Supreme Court has said that the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration, nor that the statement be admissible as evidence. **Palermo v. United States**, *supra*, p. 353, n. 10.

of judicial discretion on the part of the trial judge in not ordering the production of the memoranda prepared by the witnesses after the interviews had been completed, particularly since parts of the memoranda were based upon the notes and interpretations of other agents. We hold that such reports and memoranda are not statements within the meaning of the statute. Accordingly, the defendants were not entitled to their production for use in the trial. **Palermo v. United States**, supra; **Johnson v. United States** 269 F. 2d 72 (10th Cir. 1959); **Borges v. United States**, 270 F. 2d 332 (D. C. Cir. 1959); **Papworth v. United States**, 256 F. 2d 125 (5th Cir. 1958), cert. denied, 358 U. S. 854; rehearing denied, 358 U. S. 914.

Next, defendants complain that the trial court committed reversible error in refusing to direct an acquittal, or in the alternative to grant a new trial. In support of this allegation, defendants argue that the Government failed to prove that the tax allegedly due was in fact not paid by the various government witnesses who testified that they had received bets ultimately covered by the defendants. This argument is based upon defendants' contention that the various tavernkeepers who accepted bets were not "agents" of the North Sales Company, but rather independent bookies who were themselves liable for the 10 per cent excise tax on wagers accepted by them, notwithstanding the fact that they laid-off a portion of the bets to defendants. Treasury Regulation 325.24 (b).

The record shows that on cross-examination by defendants' counsel, the tavernkeepers testified that the defendants exercised no control over them as to which bets to accept or reject. However, the record also shows that all but one testified that they were directly engaged by one of the defendants to receive wagers, and received their commissions on a monthly basis. They also testified that upon receiving wagers they reported them to the North

Sales Company by telephone. A messenger delivered form sheets and scratch sheets to them and either picked up the money received as wagers, or left money for the payment of winners. It appears that all records of wagers and computations of winnings and losses were made by defendants. Agent Mochel testified that his examination of defendants' books and records did not reveal any attempt to differentiate between regular bets and lay-off bets. Likewise, defendants did not report that they had accepted any lay-off wagers on their wagering tax returns for July, 1956, through April, 1957, although they were required to report the "[g]ross amount of lay-off wagers accepted during month."

Under these circumstances, the jury could have found that the tavernkeepers were not independent bookies, themselves liable for the tax, but rather that they were accepting bets for the defendants. See **United States v. Calamaro**, 354 U. S. 351, 356 (1957). Furthermore, we find no statutory language which would require the Government to prove that the tax allegedly due from the defendants was not paid by someone else. See 26 U. S. C., §§ 4401, 6419 (b) and 7201.

The defendants also contend that the Government failed to prove "willfulness," "knowledge," or "intent" with respect to Counts I, III, IV and V of the indictment. Here again, defendants rely on the "independent bookie" theory, and that the amount of bets not reported constituted lay-off bets, which defendants in good faith thought they did not have to report. As heretofore stated, these were questions for the jury.¹² "The specific willful intent and bad motive required for conviction . . . is, of course, inherently

¹² The evidence that defendants did not segregate lay-off bets in their own books or tax returns could be considered by the jury as showing willfulness or intent.

insusceptible of direct proof." **Lloyd v. United States**, 226 F. 2d 9, 14 (5th Cir. 1955).

Defendants' alternative argument, that any proof of willfulness applies only to Clancy, must likewise fail. Although it appears from the record that Clancy alone signed the tax returns and had charge of the books and records, it was also established that Prindable and Kastner were partners in the enterprise with a proprietary interest. The jury could reasonably find from all the evidence that the latter two also had the requisite intent. This case is not like the situation in **Ingram v. United States**, 360 U. S. 672 (1959), relied upon by defendants, where the court reversed the convictions of two relatively minor clerical functionaries at the headquarters of the operation.

Further, defendants contend as to Count V, that there was no evidence produced by the Government of an **agreement** to commit an offense against the United States. However, evidence of an express agreement is unnecessary. As this court stated in **United States v. Gordon**, 138 F. 2d 174 (7th Cir. 1943), at page 176:

"[A conspiracy] is seldom capable of proof by direct testimony and may be inferred from the things actually done. It is enough if the minds of the parties meet and unite in an understanding way with the single design to accomplish a common purpose, which may be established by circumstantial evidence or by deduction from facts from which the natural inference arises that the overt acts were in furtherance of a common design, intent and purpose. . . . If the parties act together to accomplish something unlawful, a conspiracy is shown."

Here, the jury, considering all the evidence, could reasonably find that an unlawful conspiracy did exist. There is no reason for this court to upset the jury's finding. See **Pereira v. United States**, 347 U. S. 1, 12 (1954).

Defendants also argue that the trial court committed reversible error in failing to give certain instructions to the jury which they tendered, and in wrongfully instructing the jury as to the law of the case. We have examined the court's instructions and find them as a whole to be correct in law and fair to the defendants. The materiality of the false statements in Counts I and III of the indictment is a question for the court and not the jury. **United States v. Alu**, 246 F. 2d 29, 32 (2d Cir. 1957); **United States v. Parker**, 244 F. 2d 943, 950 (7th Cir. 1957), cert. denied, 355 U. S. 836.

True, defendants were entitled to instructions on their theory of the case for which there was any foundation in the evidence, even though they did not present any testimony. **United States v. Indian Trailer Corporation**, 226 F. 2d 595, 598 (7th Cir. 1955); **United States v. Phillips**, 217 F. 2d 435, 441 (7th Cir. 1954). However, they were not entitled to instructions "resting upon mere speculative assertions manufactured wholly from thin air." **United States v. Achilli**, 234 F. 2d 797, 808 (7th Cir. 1956), cert. denied, 352 U. S. 916, vacated 352 U. S. 1023, affirmed 353 U. S. 373, rehearing denied 354 U. S. 943.

A review of defendants' tendered instructions relied upon on appeal reveals that they are either partially incorrect in law (Instruction VIII), covered in substance by the court's instructions (Instruction XIX), not supported by the evidence (Instruction III), or abstract and irrelevant (Instruction IX). The court committed no reversible error in refusing to give such tendered instructions.

Finally, as respects the defendants' last major argument concerning alleged misconduct on the part of a juror, and the court's refusal to allow one of the attorneys for the defendants to testify regarding the same unless he withdrew from the case, we find no merit.

The disposition of a motion for new trial rests within the sound discretion of the trial judge, and his ruling on the motion is subject to review only for an abuse of judicial discretion. **United States v. Empire Packing Co.**, 174 F. 2d 16, 20 (7th Cir. 1949). Moreover, the integrity of the jury may not be assailed by mere suspicion and surmise, but it is presumed that the jury are true to their oath and conscientiously observe the instruction of the court. **United States v. Sorcey**, 151 F. 2d 899, 903 (7th Cir. 1945).

—Although an attorney is competent to testify in his client's behalf, the court is then justified in excluding him from further participation in the trial. **Christensen v. United States**, 90 F. 2d 152, 155 (7th Cir. 1937). Here, the attorney refused to withdraw from the case; and we hold that under such circumstances, it was not an abuse of discretion for the court to refuse to hear his testimony.

The testimony of Mrs. Simmons was plainly insufficient to support defendants' allegations that a juror **who actually served** on the petit jury had answered falsely on voir dire examination and was prejudiced against gamblers.

Also, it is clear from the trial court's memorandum that defendants waived the objections to the qualifications of the petit juror which they press here. If a party obtains knowledge during the progress of a trial of misconduct on the part of a juror, he must object at once, or as soon as the opportunity is presented, or be considered as having waived his objection. See 89 C. J. S., Trial, § 483. Merely calling the matter to the attention of the court without any objection thereto is insufficient; and it is not incumbent upon the court to take action with respect thereto on its own volition. 89 C. J. S., Trial, § 484. The defendants knew of this matter during trial, but did not pursue it fully or make a motion of any kind. Under these circumstances, defendants waived any objection arising therefrom.

For the reasons herein set forth, we affirm the judgment of the district court.

Affirmed.

Schnackenberg, Circuit Judge, concurring.

The failure of the trial judge to require the production by the government of the memoranda prepared by certain government witnesses presents a difficult question on this appeal. However, I am not convinced that Judge Steckler's holding on that subject is wrong.

The language in the cases which he cites lends considerable support to his conclusion.

A true copy:

Teste:

Kenneth J. Carriek,
Clerk of the United States Court of
Appeals for the Seventh Circuit.

Seal

Judgment.

United States Court of Appeals
For the Seventh Circuit.

Chicago 10, Illinois.

Thursday, March 24, 1960.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. William E. Steckler, District Judge.

United States of America,
Plaintiff-Appellee.

No. 12,815. vs.

Thomas D. Clancy, James F.
Prindable and Donald Kastner,
Defendants-Appellants.

} Appeal from the
United States
District Court
for the Eastern
District of
Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be and the same is hereby Affirmed, in accordance with the opinion of this Court filed this day.

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JUN 10 1960

JAMES R. BROWNING, Clerk

No. 282

88

In the Supreme Court of the United States

OCTOBER TERM, 1959

THOMAS D. CLANCY AND DONALD KASTNER, PETITIONERS .

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE BANKIN,

Solicitor General,

MALCOLM RICHARD WILKEY,

Assistant Attorney General,

BEATRICE ROSENBERG,

JEROME M. FEIT,

Attorneys,

Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 982

THOMAS D. CLANCY AND DONALD KASTNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. B) are reported at 276 F. 2d 617.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1960 (Pet. App. B, 55). A petition for rehearing was denied on April 14, 1960. The petition for a writ of certiorari was filed on May 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the seizure of the paraphernalia of a bookmaking operation under a lawfully issued and

executed daytime search warrant constituted an improper taking of private books and papers.

2. Whether the failure of the trial court to permit defense counsel to inspect the formal reports of agent-witnesses constituted prejudicial error where the longhand notes from which these reports were produced were turned over to defense counsel.

STATEMENT

On July 25, 1957, a five-count indictment was returned in the United States District Court for the Eastern District of Illinois. Count 1 charged petitioner Clancy with a wilful misstatement during an interview with Internal Revenue Agents Martin O. Mochel and W. L. Buescher, on or about December 13, 1956, in violation of 18 U.S.C. 1001 (R. 24).¹ Count 4 charged all three defendants—petitioner Clancy, petitioner Kastner, and defendant Prindable, who has not petitioned for a writ of certiorari—with attempting to evade a substantial portion of the amount of wagering excise taxes due and owing the United States for the fiscal year ending June 30, 1957, in violation of 26 U.S.C. 7201 (R. 26-29). Count 5 charged the three defendants with conspiracy to defraud the United States in the administration of the internal revenue laws (R. 29-32).²

¹"R." designates the appendix to petitioners' brief in the court of appeals. "T." refers to the trial transcript, filed with the Clerk of this Court.

²Count 2 (R. 24-25) charged that petitioner Kastner made wilful misstatements at an interview with Agent George W. Kienzler on or about May 6, 1957, in violation of 18 U.S.C. 1001. Kastner was acquitted by the jury on this count (R. 188; T. 368). Count 3 charged a similar false statement on or

Following jury trial, petitioner Clancy was convicted on counts 1, 4, and 5. He was sentenced to four years' imprisonment on each count, to run concurrently, and fined \$5,000 on count 4. Petitioner Kastner was convicted on counts 4 and 5 and sentenced to three years' imprisonment on each count, to run concurrently. He was fined \$2,000 on count 4 (R. 81, 82, 188; T. 368). Each defendant was ordered to pay one-third of the court costs (R. 81-82). The court of appeals affirmed the convictions (Pet. App. B, 23-54).

The facts pertinent to the issues raised in the petition may be summarized as follows:

The Seizure:

1. On May 5, 1957, an Affidavit for Search Warrant was filed by Internal Revenue Agent Glenwood Johnson, detailing the personal observations and activities of various Internal Revenue Agents which had led to the conclusion that a bookmaking operation was being conducted on the top floor of the premises at 2300 State Street, East St. Louis, Illinois (R. 5-18). An affidavit of Joseph M. Heckelbech, Chief of the Collection Division in the Office of the District Director at Springfield, Illinois (incorporated in Johnson's affidavit for the search warrant), stated that, from his official records, he had determined that no gambling tax stamp had been issued for these premises to any person, nor about December 14, 1957, against defendant Prindable (R. 25-26), on which the jury found him guilty (R. 188; T. 368).

³ Defendant Prindable was convicted on counts 3, 4, and 5. He was sentenced to three years on each count to run concurrently, and fined \$2,000 on count 4 (R. 81, 82, 187; T. 368).

had wagering tax returns been filed by anyone at that address (R. 11-13; see R. 14-15).

Satisfied that probable cause was shown, the district court issued a daytime search warrant for the entire second floor of the premises (R. 19-21). The warrant authorized the seizure of "books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business * * * and divers other tools, instruments, apparatus, United States currency and records" used in the wagering business (R. 20).

2. On May 6, 1957, Agent George Kienzler, accompanied by other agents, executed the warrant, seizing at the described premises, *inter alia*, miscellaneous notes, pads, racing forms, scratch sheets, telephone bills, and over \$2,100 in currency (R. 21-23). Agent Kienzler did not determine at that time whether the North Sales Company (a partnership consisting of petitioners and Prindable) had a tax stamp, but simply obeyed the command of the warrant (R. 94; T. 56-57).⁴ A copy of the warrant together with a receipt

⁴ At the trial, the agent testified that petitioner Kastner, who was present when the search was made, informed him that he, Clancy, and Prindable were partners in North Sales, and that Clancy had gotten a tax stamp for the partnership (R. 93; T. 41-42, 50-51). It was further shown at the trial that the North Sales Company had applied for and received a tax stamp for the year ending June 30, 1957, had filed monthly tax returns purporting to show the wagers accepted by them, and had paid the 10 percent tax thereon (Pet. App. B 25; R. 139-142; T. 14-16, 266-271, 273, 275). The applications and returns bore the business address "2401 Ridge Avenue." The words "at Large," which had been written on the same line as "2401 Ridge Avenue," had been pencilled out. There was no clear explana-

for the items seized were given to petitioner Kastner, who was then present on the premises (R. 21, 95). No arrests were made.³

3. On July 25, 1957, defendants' motion for return and suppression of the seized items (R. 36-40) was denied by the trial court (R. 43). It held that the warrant was plainly sufficient on its face, that there was probably cause for its issuance, and that "the items seized were not the private books or papers of these defendants, but rather was property used in the commission of a crime * * *" (R. 48-53).

4. At the trial, after Agent Kienzler identified the items seized, they were admitted in evidence (G. Exhs. 54-112; R. 89-93; T. 39-41, 43-48). Agent Mochel thereupon testified, that his computations, based on exhibits 54-79, revealed that the total wagers accepted by the defendants for March 1957 were \$103,441.30, upon which a net tax of 10% was due and owing the United States (T. 292-295). For that month the defendants, doing business as the North Sales Company, had reported accepting wagers of only \$11,913.50 and had paid but \$1,191.35 in tax (R. 27, 144-148, 151-152; T. 22-23).

The Production of Agent-Witnesses' Statements:

To support count 4 (the tax evasion charge) the government relied essentially upon documentary evidence—the items seized during the search, computation at the trial when this had been done (R. 85-87, 139-142; T. 23-28; see T. 271-272, 274).

³ Some of the information obtained from the seized items was presented to the grand jury which returned the instant indictment (R. 41-42).

tions therefrom as explained by government agents, and the defendants' tax returns. Thus, the production issue basically relates to the false statement charges (counts 1-3) stemming from interviews between Internal Revenue agents and the defendants.

1. Agent Kienzler described at the trial the interview which he had on May 6, 1957, at the time he executed the search warrant, with petitioner Kastner (R. 92-93; T. 41-42, 50-51; see *supra*, pp. 4-5). Defense counsel did not inquire of the witness whether he had taken notes or made a report of the conversation with Kastner. Nor did counsel make any demand for production.

After Agent Ira L. Minton had testified on direct examination that he was present at this interview, and had also described what had been said (R. 96-97; T. 72-74), defense counsel demanded "the production of any statements and reports" of this witness "which relates to the subject matter this witness has testified to" (R. 97; T. 74-82). The judge ruled that only what the witness "wrote down contemporaneously with the making of any statement of the defendant Kastner" would be subject to production (T. 74-75). He denied the request as to "any report this witness * * * made to his superiors * * * subsequent to the conversation * * *" (R. 97; T. 75). Agent Minton stated that he took no notes at the time of the interview but had made a memorandum of the conversation after his return to his office (R. 97-98; T. 77, 83). The request for this report was thereafter renewed and denied by the trial judge (R. 99; T. 82-83).

Petitioner Kastner was acquitted on the false statement charge stemming from this interview (R. 24-25, 188; T. 368).

2. Agent Frank R. Hudak testified to an interview with petitioner Kastner on July 23, 1957, at which time Kastner spelled out his active participation in accepting wagers and keeping records and admitted that he knew the partnership was doing over \$10,000 business each month (R. 104-106; T. 108-112). On cross-examination, the agent testified that longhand notes were taken during the course of the interview and that thereafter they were transformed into a memorandum (T. 113). Pursuant to the request of defense counsel, the agent's notes of the interview were turned over for inspection (R. 106-107; T. 116-117).

Agent Mueller testified that he was present at the July 23 interview of petitioner Kastner (R. 109-110; T. 135-137). On cross-examination, he stated that he had also taken notes of the interview, independent of those taken by Agent Hudak. Upon request of the defense, these notes were also produced for inspection (R. 110; T. 139-140). This agent was not

* From the terms of the demand and the response of the trial judge, it is unclear whether the memorandum incorporating Agent Hudak's notes was also turned over. The colloquy was as follows (T. 116):

Mr. O'Connell: We request now, the statement or memorandum taken by Mr. Hudak and his notes be submitted to us for the examination, your Honor.

The Court: The motion is granted * * *

The opinion of the court below, however, indicates that only the notes were turned over (Pet. App. A, 32-34).

questioned as to whether he had prepared a later memorandum of the interview.

3. Agent Wilbur Buescher testified that on December 13, 1956, he and Agent Mochel interviewed petitioner Clancy, and on December 14, Clancy, Prindable, and Kastner. At these interviews, Clancy explained the betting operations of the North Sales Company and stated that the only agents employed by the partnership to accept wagers were Charles Kastner (petitioner Donald Kastner's brother) and Malcolm Wagstax (R. 99-100; T. 84-87, 87-89).⁷ At the December 14th interview, defendant Prindable said that the Company did not lay off any bets to other bookmakers, that no bets were taken on the phone, and that he did not even know any other bookmakers (R. 100-101; T. 87-88).⁸ On cross-examination, Agent Buescher stated that Agent Mochel took longhand notes of these interviews and that he (Buescher) had thereafter prepared a memorandum from these notes which "agreed with everything in them" (R. 101-102; T. 89-91). The court denied the defense request for the memorandum (R. 102; T. 90-91).

Agent Mochel testified that he was present and took part in these interviews, and corroborated Agent Buescher's recollection as to what was said by petitioner Clancy and defendant Prindable (R. 142-143; T. 279-283). On cross-examination, the agent stated he took notes of these interviews and used the notes

⁷ This testimony was the basis of the false statement charge in count 1. Several witnesses testified for the government that they had accepted wagers under arrangements with petitioners and Prindable (see, e.g., T. 143-147, 151-154, 156-160, 164-168).

⁸ This testimony was the basis of the false statement charge against Prindable in count 3.

in later preparing his formal memorandum (T. 301-302). These longhand notes were turned over to defense counsel for inspection (T. 302-303).

ARGUMENT

7. Petitioners contend (Pet. 7-13) that the seizure at their premises was of private books and papers of evidentiary value only and hence was unlawful. They argue that what may be seized from a gambling business depends upon how the business is carried out. In their view, if a gambler obtains the requisite tax stamp and files monthly wagering returns, the notes and records of the gambling business are, at most, evidence of crime and not subject to seizure.⁹ This contention is without substance.

Whether the illegality is in failing to report, or in reporting falsely, a federal crime has been committed, and in either case every instrumentality used in the commission of such crime is subject to seizure under a validly issued search warrant.¹⁰ See, *e.g.*, *Merritt v.*

⁹ In this connection, it should be pointed out that, since the seized items were subject to inspection by Internal Revenue agents under statute (see, *e.g.*, 26 U.S.C. 4403, 4423, 6001, 7606(a)), they are not private books and papers. Cf. *Shapiro v. United States*, 335 U.S. 17-20, 32-33; *Davis v. United States*, 328 U.S. 582, 589-590; *Wilson v. United States*, 221 U.S. 361, 380-382.

¹⁰ Petitioners' reliance on *Takahashi v. United States*, 143 F. 2d 118 (C.A. 9), is misplaced. In that case customs agents authorized to search at ports of debarkation only for contraband articles seized telegrams and letters without probable cause, or warrant of any kind. Moreover, as the court below pointed out, these items were merely evidence of an intention to commit a crime in the future (Pet. App. A, 40-41). In this case, the items taken were seized under a lawful search warrant and were the normal paraphernalia of bookmaking.

United States, 249 F. 2d 19, 21 (C.A. 6); *United States v. Joseph*, 174 F. Supp. 539, 544-545 (E.D. Pa.); cf. *Harris v. United States*, 331 U.S. 145, 154; *Marron v. United States*, 275 U.S. 192, 194-195. In this case the items seized were the normal paraphernalia of a bookmaking operation—i.e., notes, pads, racing forms, phone bills, and similar items—and were clearly within the scope of the warrant, directed, *inter alia*, to “books, memoranda, tickets, pads, tablets and papers * * * used to conduct the wagering business (R. 20). There is no question that the warrant was issued on probable cause to believe that petitioners were carrying on a bookmaking operation without the requisite tax stamp and without filing the required monthly returns (see the Statement, *supra*, pp. 3-4). Just as an illegal search and seizure is not rendered lawful by what it turns up, so a search and seizure, lawful in the first instance, is not subject to challenge because of subsequently disclosed information.”

2. Soon after the decision below that the agent-witnesses’ formal reports of interviews with the defendants were not statements of witnesses producible under 18 U.S.C. 3500 (Pet. App. A, 47-49), the Seventh

¹¹ In any event, this information—that petitioners had a tax stamp and had filed monthly returns—would not have rendered the warrant invalid even if it had been known at the time the warrant was issued. The filed papers stated that the partnership was doing business at another address, not the premises which were searched. Since 26 U.S.C. 4412(a)(2) requires that each place of business must be registered, it is clear that the tax stamp did not cover the premises searched and that therefore the warrant was properly issued even if the information later disclosed is taken into account.

Circuit twice ruled the other way. In *United States v. Berry*, No. 12822, decided May 2, 1960, and *United States v. Sheer, et al.*, Nos. 12826-12828, decided May 10, 1960,¹² that circuit held that 18 U.S.C. 3500 did reach the communicated reports of agent-witnesses. These decisions accord with the government's position in *Needelman v. United States*, No. 278, this Term, decided May 16, 1960, to the effect that statements otherwise producible under 18 U.S.C. 3500 are not immunized from production because they happen to be statements of government agents. In view of these later holdings, clarifying the Seventh Circuit's interpretation of the purpose and reach of the "Jencks" Act as it concerns the reports of agent-witnesses, we submit that petitioners raise no production issue of significance warranting review by this Court.

In any event, we believe that, in the circumstances of this case, the trial court's refusal to command the production of agent-witnesses' formal reports constituted harmless error. Following the direct testimony of Agents Hudak, Mueller, and Mochel, longhand notes of the interviews with the defendants, which were prepared contemporaneously with the interviews and constituted the bases of the later prepared reports, were turned over to defense counsel for inspection. And while Agent Buiescher, who along with Mochel had conducted the December 13-14 interviews had not made notes, he testified that his formal memorandum was but a duplication of Mochel's notes "since he agreed with everything in them" (R. 101-102; T.

¹² For the convenience of the Court, these opinions are printed as an Appendix, *infra*, pp. 14-29.

89-91). Petitioners, in short, received the "work-product" from which the reports denied them were compiled, transcribed at the exact time the interviews occurred.¹³ As this Court stated in *Rosenberg v. United States*, 360 U.S. 367, 371: "when the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial." Similarly, it can be said here that, in obtaining the long-hand notes, petitioners were afforded the privilege of examining the original descriptions of the interviews from which the formal reports were compiled and therefore could not have been prejudiced by lack of opportunity to inspect the derivative reports themselves.

Nor was there prejudicial error in the trial judge's refusal to turn over the formal report of Agent Minton. That agent testified that he was present when Agent Kienzler interviewed petitioner Kastner on May 6, 1957, and that he took no notes but prepared a memorandum of what he had heard (R. 96-97; T. 72-74, 82-83). But petitioners never sought to ascertain from Agent Kienzler, who testified in detail as to what Kastner had told him, whether he had taken notes of that interview, nor did they seek to obtain

¹³ As we contended in *Needelman v. United States*, No. 278, this Term, decided May 16, 1960 (Gov. Br. pp. 18-31), we do not believe that defendants are entitled to the non-communicated notes of agent-witnesses under 18 U.S.C. 3500. Therefore, petitioners here may not have been entitled (if the notes were in fact not communicated) to the production of all the various sets of notes. The notes, however, were produced and therefore there is no issue as to them.

any document to impeach Kienzler's testimony. Moreover, the information obtained at the May 6 interview provided the basis of the false statement charge contained in count 2, upon which petitioner Kastner was acquitted (see the Statement, *supra*, p. 2, n. 2). No prejudice could have occurred because the trial court refused to turn over Agent Minton's report of this interview.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

J. LEE RANKIN,

Solicitor General.

MALCOLM RICHARD WILKEY,

Assistant Attorney General.

BEATRICE ROSENBERG,

JEROME M. FEIT,

Attorneys.

JUNE 1960.

APPENDIX

In the United States Court of Appeals for the
Seventh Circuit

SEPTEMBER TERM, 1959—APRIL SESSION, 1960

No. 12822

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID BERRY,
Defendant-Appellant.

Appeal from the
United States
District Court
for the Northern
District of Indi-
ana.

• May 2, 1960

Before HASTINGS, *Chief Judge*, SCHNACKENBERG,
Circuit Judge and MERCER, *District Judge*.

HASTINGS, *Chief Judge*. Defendant-appellant David Berry and one Sylvester Brown were charged in a two-count indictment with selling heroin in violation of 26 U.S.C.A. § 4704(a); and with the unlawful receipt, concealment and sale of heroin after unlawful importation in violation of 21 U.S.C.A. § 174. On motion of the Government, the two counts were dismissed as to Brown; and defendant was tried by a jury and found guilty on both counts. Judgment was entered on the jury verdict. Defendant was sentenced for a term of five years and fined in the sum of \$5,000 on the first count and was sentenced for a

term of twenty years and fined in the sum of \$5,000 on the second count, the sentences to run consecutively. This appeal followed.

The trial court denied defendant's motions for acquittal made at the close of the Government's case and again at the conclusion of all the evidence. The errors relied upon for reversal relate to the admissibility and exclusion of certain evidence; to instructions given by the court; to the denial to defendant's counsel of the right to inspect a written report of a Government witness; and to certain questions propounded by the Government to one of its witnesses.

In view of the disposition to be made of this appeal, we shall limit our consideration of the alleged errors to the denial of the right of inspection of the written report of the Government witness.

Anthony D. Johnson, a key witness for the Government, testified that he was a federal narcotics agent assigned to Chicago, Illinois; and that prior to the alleged narcotics violations he was in Gary, Indiana, conducting an undercover investigation of illicit narcotics traffic in Gary that subsequently led to the arrest and indictment of defendant. Johnson testified concerning the details of his investigation. On cross-examination, he stated that he made a written report of the case to the Government, giving a copy to the United States Attorney in Hammond, Indiana; that the report was prepared in his office subsequent to his investigation; and that his testimony at the trial was substantially the same as it appeared in his written report given to the Government.

During Johnson's cross-examination, defendant's counsel moved for an order of court directing the Government to produce Johnson's written report for inspection by such counsel for use in further cross-examination for impeachment purposes, pursuant to

the so-called "Jencks" Act, 18 U.S.C.A. § 3500. The trial court sustained the Government's objection to this motion to produce on the ground that the statute was not applicable to this situation, and the motion for inspection was denied.

The pertinent parts of the statute read:

"§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him * * *."

It seems clear that the character of the report of the witness comes within the purview of the statute. Subsection (a) is found to be satisfied when the wit-

ness, who made the report "testified on direct examination in the trial of the case." It is admitted that the "statement * * * of the witness in the possession of the United States * * * relates to the subject matter as to which the witness has testified," as required in Subsection (b). It cannot be seriously doubted that the report is covered by the definition found in Subsection (e)(1) as being "a written statement made by said witness and signed or otherwise adopted or approved by him."

Since the enactment of 18 U.S.C.A. § 3500, following the decision in *Jencks v. United States*, 353 U.S. 657 (1957), a decisional pattern has started to evolve. The statute "and not the *Jencks* decision governs the production of statements of government witnesses for a defendant's inspection at trial." *Rosenberg v. United States*, 360 U.S. 367, 369 (1959); *Palermo v. United States*, 360 U.S. 343 (1959).

Subsection (a) "manifests the general statutory aim to restrict the use of such statements to impeachment." *Palermo v. United States*, *supra*, at page 349. In determining whether, in a doubtful situation, a particular statement comes within the terms of Subsection (e), the Supreme Court approved "the practice of having the Government submit the statement to the trial judge for an *in camera* determination," and said that while the "statute governs the production of documents," it "does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced." *Id.* at page 354. The Court points out that the limiting design of the statute would be defeated if "the defense may see statements in order to argue whether it should be allowed to see them." *Ibid.*

In *Palermo*, the Court held that a Government agent's brief summary of approximately 600 words,

of a 3½ hour interrogation of a witness, was not a "statement" within the definition in Subsection (e). In *Rosenberg*, the Court held that two reports by FBI investigators did not comply with the statute since they "were neither signed nor otherwise adopted by any witness at the trial, nor were they reproductions as statutorily required of any statement made by any witness at the trial." 360 U.S. at page 369.¹ The Court also considered other types of "statements" in that case.

In the instant case we have a Government agent as the witness whose written report to his superiors is sought to be produced for the purpose of his impeachment. The critical question before us is whether such an agent witness comes within the category described in Subsection (a) as being a Government witness who made a report to an agent of the Government. The Supreme Court of the United States has not yet passed upon this precise question.

In *Palermo and Rosenberg*, the defendant sought production to impeach a *lay witness*. Production was denied because the statements in question did not meet the statutory test. To the same effect is the holding in *Borges v. United States*, D.C. Cir., 270 F. 2d 332 (1959).

Cases involving the impeachment of *Government informant witnesses*, following the decision in *Jencks*, include our holding in *United States v. Killian*, *supra*; and *Papworth v. United States*, 5 Cir., 256 F. 2d 125 (1958), cert. denied, 358 U.S. 854. In *Papworth*, the court

¹For statements recently held by our court as not coming within the statute, see *United States v. Clancy, et al.*, 7 Cir., 276 F. 2d 617 (March 24, 1960). For an analysis of the correct procedure for a district court to follow in such cases, see *United States v. Killian*, 7 Cir., 275 F. 2d 561 (January 11, 1960). Each of these cases took cognizance of the holdings in *Palermo and Rosenberg*.

held that the agent's longhand notes made at the time of interrogation were subject to production, but that his subsequent investigative report did not meet the statutory requirement.

Situations concerning a *Government agent witness*, as in the case at bar, in addition to *United States v. Clancy*; *supra*, have been considered by courts of appeal. In *Needelman v. United States*, 5 Cir., 261 F. 2d 802 (1958), cert. granted, 361 U.S. 808 (1959), a narcotics agent made notes of his investigation dealing with defendant, and later prepared an investigative report from them. At trial, the investigative report was delivered to defendant for inspection but the agent's longhand notes were not. The Fifth Circuit affirmed on the ground that the notes did not come within the statute. This holding was followed in *Tillman v. United States*, 5 Cir., 268 F. 2d 422 (1959). In *Bradford v. United States*, 9 Cir., 271 F. 2d 58, 65 (1959), on petition for rehearing, the court reached a result opposite to that in *Needelman* and *Tillman*, grounding its decision on the *Jencks* case rather than the statute. In *Johnson v. United States*, 10 Cir., 269 F. 2d 72 (1959), a government agent case, the court held the memorandum in question was not a statement within the meaning of the statute.

In *Holmes v. United States*, 4 Cir., 271 F. 2d 635 (1959), the court faced and squarely decided the issue before us here, saying:

"The Government now contends, however, that the Jencks Act does not apply to statements prepared by a government agent who becomes a witness at the trial. In the *Jencks* case, itself, the defendant sought the production of FBI reports in order to obtain material with which to cross examine an FBI informer, and clearly that was the situation which Congress had principally in mind when it enacted the Jencks Act. The written report

of the agent, however, is just as much a verbatim statement of the agent, who prepares it, as a written statement of an informer, incorporated in the report, is the statement of the informer. It is a statement within the literal and evident meaning of subsection (e) of the Act. Its use to contradict the agent who prepared it in no way contravenes the policy of the Act against the use of an investigator's notes or summaries of information to contradict his informer. * * *

* * * Certainly, however, we can find nothing in the Jencks Act which suggests that defense counsel are entitled to no statement of the witness, simply because he happens to be an agent of the FBI. * * * (Id. at page 638)

We agree with the rationale and result reached by the Fourth Circuit in the *Holmes* case. We hold that where the nature of the statement sought otherwise meets the requirements of the *Jencks* statute, as in this case, such a written statement prepared by a Government agent may be used by the defendant in cross-examination of such witness for impeachment purposes. It necessarily follows, of course, that the use of such a statement is subject to the limitations and safeguards imposed by the statute and, once produced, its admissibility and use is governed by the proper rules of evidence. The trial court erred in denying defendant's motion to produce the report in question.

Our holding is consistent with *Bergman v. United States*, 6 Cir., 253 F. 2d 933 (1958) and *Lohman v. United States*, 6 Cir., 251 F. 2d 951 (1958), both prior to the *Jencks* case, and with *United States v. Prince*, 3 Cir., 264 F. 2d 850 (1959). In construing 18 U.S.C.A. § 3500, *Prince* relies upon *Bergman* and *Lohman*.

Counsel point to a distinction suggested in our recent opinion in *United States v. Clancy*, *supra*, where-

in it was noted that the Government witness was not an undercover agent witness, but was known to defendants when they were interviewed. While this factual distinction is correct, it was not necessary to our holding in *Clancy* on this proposition. The result in *Clancy* rests on the facts of that case relating to the nature of the notes, reports and memoranda there under consideration.

The judgment of the district court is reversed, and this cause is remanded for a new trial.

REVERSED and REMANDED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

In the United States Court of Appeals
for the Seventh Circuit

SEPTEMBER TERM, 1959—APRIL SESSION, 1960

Nos. 12826, 12827, 12828

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT SHEER, GORDON FOSTER
and THOMAS JACKSON,
Defendants-Appellants.

Appeals from the
United States
District Court
for the Eastern
District of Illi-
nois.

May 10, 1960

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Robert Sheer, Gordon Foster and Thomas Jackson, defendants, appeal from judgments of conviction in the district court entered on jury verdicts. Sheer was sentenced to concurrent five year terms of imprisonment under counts I, II, V and IX, ~~to~~ concurrent three year terms under counts IV and VI, and was fined \$5,000 and costs under count V. Foster was sentenced to concurrent five year terms of imprisonment under counts VII and IX and was fined \$5,000 and costs under count IX. Jackson was sentenced to one year imprisonment and costs under count VIII of the indictment, and under count IX his sentence was suspended and he was placed on probation.

As stated by defendants, the errors relied upon arise out of the overruling of each defendant's motion for judgment of acquittal at the close of the entire case, the improper admission of evidence on behalf of the government, the refusal to limit statements attributed to one defendant to the declarant, the refusal to grant a severance or a mistrial as to Foster and Sheer after admitting into evidence against Jackson a statement attributed to him, the refusal to allow defendants to have certain internal revenue reports for the purpose of cross-examining government's agents, the refusal to allow defendants to have the grand jury testimony of certain witnesses for the purpose of cross-examination, the giving of erroneous instructions, the failure to give certain instructions offered by defendants, the excessive sentences, the failure of the court reporter to transcribe the entire proceedings, the improper selection of the grand jury and the overruling of motions to quash two search warrants and to suppress the evidence seized under those warrants.

The making of false statements in a matter within the jurisdiction of the United States Treasury Department was charged against Sheer in counts I, II, and IV, against Foster in count VII and against Jackson in count VIII. Sheer was therein charged with falsely stating on March 26, 1957, May 6, 1957 and July 3, 1956, that he had no employee or agent accepting wagers on his behalf. Foster was accused of falsely stating on May 6, 1957, to Special Agents conducting a criminal investigation that he never accepted wagers, and that he had no business interest in the Roberts Motel and Bar. Jackson was accused of making a statement on May 6, 1957, that he did not accept wagers. Count V charged that on May 29, 1957, Sheer attempted to evade the payment of

wagering excise taxes due for April, 1957, by filing a wagering excise tax return listing the gross wagers accepted by him as \$1,851.00 and the tax as \$181.50, when he knew the "gross amount of wagers accepted by him" during that month was \$2,365.00 and more and the tax due was \$236.50 and more. Count VI charged Sheer with subscribing and filing a tax return application for registry-wagering, on July 3, 1956, falsely declaring under the penalties of perjury that it was true, correct and complete when it did not describe his place of business, and stated he did not engage any employee or agents in receiving wagers in his behalf.

Count IX charged that, on or about November 1, 1955, or prior thereto and continuing up to and including the indictment date (July 25, 1957), defendants did unlawfully conspire "to defraud the United States in its administration of the Internal Revenue Laws and to violate Sections 7201, 7203, 7206, 4411, 4412, 4901, 7262" of Title 26 and Section 1001 of Title 18, U.S. Code. The indictment then alleged certain matters as a part of the conspiracy. It charged as overt acts each of the other counts of the indictment and three additional overt acts.

As above stated, counts II, VII and VIII charged, respectively that defendants Sheer, Foster and Jackson knowingly made a false and fraudulent statement of a material fact to Special Agents of the Internal Revenue Service on May 6, 1957.

The statute alleged to be violated, 18 U.S.C.A. § 1001, provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or represen-

tations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000.00 or imprisoned not more than five years, or both."

Upon the trial, all of the principal government witnesses were agents of the government. After the direct examination of each of these witnesses, defendants demanded the right to inspect the reports which the agents had made. Defendants were given statements of the agents which were made contemporaneously with the events reported¹ but, under the court's ruling, they were denied other statements. It was the government's position that "we will supply memoranda taken down in questioning defendants at the time of the questioning that took place but we will not show the Internal Revenue *reports* relating to such things or such interviews with the defendants other than verbatim statements reported". (Emphasis supplied.) The court's view was that the defendants "will be entitled to copies of written statements made contemporaneously with the interviews".

After Agent William Edwards testified as to a raid at the Roberts Motel, defendants made a request for his report of what took place during the raid, which request was denied. Agent Donald Yerly testified in substance that he inspected the building at 929½ Missouri Avenue on May 7, 1957, and that he observed smoke in room 5 as well as ashes in a wastebasket which was warm. Across the street was a car in which he had seen Sheer riding. On the same day, after he returned to the office, Yerly made a memorandum report of what he had seen. A request by defendants for production of this report was denied

¹ However, a statement by Agent Glen Johnson was not produced because it had been lost.

by the court, without stating the ground for its ruling.²

The demand for these reports was made for the purpose of impeaching government agents Edwards and Yerly who had completed their testimony on direct examination. *Palermo v. U.S.*, 360 U.S. 343, 345. Defendants rely upon the Jencks Act, 18 U.S.C.A. § 3500, which provides: §.

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in rela-

² While it is not clear from the record that the district court denied production of the reports of Edwards and Yerly because they were not made contemporaneously with the events recounted therein, and while the evidence indicates rather strongly that these reports were made so soon after those events that they were as a matter of fact contemporaneous therewith, we are for the purpose of this case accepting the government's contention that these statements were "not made contemporaneously with the interview on the subject matter" thereof.

tion to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

We have held that this Act applies to government agents who testify for the prosecution in federal criminal cases. *U.S. v. Berry*, F. 2d , No. 12822, May 2, 1960.

We find that the term "statement" as used in the Act applies to the reports made by the agents in this case. A report is defined as "a statement in writing of proceedings and facts exhibited by an officer to his superiors". Webster's Dictionary.

Neither the wording of the Act nor its legislative history indicates any intention of protecting government agents from impeachment when they become witnesses for the government at a trial. If, subject to the safeguards set forth in the Act, the defense is permitted to test the credibility of a government agent when he appears as a witness, the purpose of the law in securing a fair trial is more nearly attained. If an agent's written reports as to matters about which he has testified on direct examination are at variance with his testimony, a well-established ground for impeachment exists. 98 C.J.S. 365. Of course, it is necessary that a foundation for impeachment first be laid by the cross-examiner. 98 C.J.S. 589. Accordingly, in the case at bar, after Edwards and Yerly, two of the principal witnesses for the

government, had each completed his direct testimony, a demand was made by defense counsel for production of their reports but an objection thereto was sustained by the district court. As to the contention of the government, which we are assuming has a factual basis in the record (see footnote 2, *ante*), that these reports were not made contemporaneously with the event therein referred to, we hold that the *time* of their making was not germane to their use as a basis for impeachment. They were statements made by the witnesses Yerly and Edwards as referred to in § 3500(e)(1). They were *not* statements such as those referred to in § 3500(e)(2).

The government contends that defendants are in no position to object to the court's rulings in this respect because they did not move to have the questioned statements marked as exhibits for consideration on appeal. They add that "This should have been done for if the defense is not prejudiced by the withholding the error is harmless." However, it affirmatively appears in the record that defense counsel inquired as to whether the reports were present in the courtroom or available and the response was in the negative. Upon oral argument it was stated to this court, and not denied, that these documents were not physically in the courtroom at the time of the proceedings referred to. Just how the defense attorney could have had the absent statements marked as exhibits by the court reporter does not appear.

Substantial error was committed in the nonproduction of the reports of Edwards and Yerly for use by defendants in their defense in the district court. It is not proper for this court to determine whether defendants were prejudiced by failure to make available to them the prior statements of Yerly and Edwards, any more than it would be proper for the

trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness' testimony in open court. *Bergman v. United States*, 253 F. 2d 933, 936. A reversal of the judgment is required. A remandment for a new trial will be ordered.

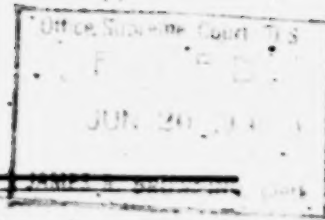
In view of that disposition of the appeal, it becomes unnecessary to consider the other grounds urged by defendants in this court.

REVERSED AND REMANDED FOR
A NEW TRIAL.

A true Copy:
Teste.

*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

FILE COPY



IN THE
SUPREME COURT OF THE UNITED STATES:

OCTOBER TERM, 1959.

No. ~~92~~ 88

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS.

PAUL P. WALLER, JR.,
JOHN F. O'CONNELL,
Suite 214, Murphy Building,
East St. Louis, Illinois,
Counsel for Petitioners.

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BRIEF FOR THE PETITIONERS.

PAUL P. WALLER, JR.,
JOHN F. O'CONNELL,
214 Murphy Building,
234 Collinsville Avenue,
East St. Louis, Illinois,
Counsel for Petitioners.

O'CONNELL and WALLER
Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 932.

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS.

I. The Government has chosen to completely ignore the important question of whether the private books and records used to conduct a wagering business constituted the **means and instrumentalities** for the commission of the crime of attempting to evade the payment of the 10% wagering tax.

They beg the question when they argue that because the Petitioners books and records were used by them in conducting the wagering business that they are "paraphernalia of bookmaking" and infer that this satisfies the requirements of Rule 41 (b) (2) of the Federal Rules of Criminal Procedure, "as the **means** of committing a criminal offense." Petitioners have already pointed out that in this connotation the items seized must be the means of committing a criminal offense against the Federal Government, and it does not suffice if the items are merely instrumentalities for the commission of a crime against an individual state. In this regard, Petitioners have already pointed out in their Petition, that they had registered as bookmakers, had obtained a wagering stamp, had paid the \$50.00 registration tax, and had reported and paid a tax on 10% of all wagers reported by them. It was no federal crime for the Petitioners to **engage** in the wagering business. The records were not falsely kept, and, in fact, the Government introduced them to show the correct amount of tax due. Therefore, the private books and records were not the **instrumentalities** for the commission of a crime against the United States, but were merely evidence of the amount of wagers received by them from all sources.

In support of this obviously erroneous conception, the Government cites as support for their position the Merritt case which authorizes the seizure of gambling equipment where the defendants had failed to register and thereby had violated a federal law **by engaging** in the wagering business without registering and paying the applicable wagering taxes. That case is totally different from the facts in this case because the violation of the federal law in the Merritt case occurred **by engaging in the business** and not as a result of the manner in which the amount

¹ Merritt v. U. S., 249 F. 2d 19 (6 Cir.)

of the 10% wagering tax was **reported**. The other cases cited by the Government are likewise cases where the mere **engaging in the business** constituted the violation of a federal law.

They seek to justify the seizure of books and records of Petitioners' business which was registered and lawful under federal law on the grounds that, a) Agent Kienzler (who seized the records) didn't determine that the Petitioners' partnership had a tax stamp—although the contrary is shown in footnote 4 of the Opposition Brief, i. e., that Petitioner Kastner was present at the time of the raid and informed Kienzler that the partnership had a wagering stamp; and, b) because the words "at large"^{1a} had been pencilled through the application for registration although there is no showing that this alteration had been made at the time of the raid, and it was affirmatively shown by Petitioners' accountant who testified that this was not done at the time he filed the application (Appellant's App. 140). Since the application was in the possession of some one or other Government agency since the time it was filed, it is only fair to assume that this alteration was made by some Government agent at sometime before trial, but there was no showing by the Government that the alteration had been made at the time the records were seized. The Government seems to argue that if a valid search warrant is issued that anything described in the warrant may be seized whether private papers or not which is, of course, contrary to the holding of this Court in the recent case of **Abel v. U. S.**, 80 S. Ct. 683, 695.

The most absurd and misleading argument of the Government is that the books and records maintained by the Petitioners in conducting the wagering business were not

^{1a} This same alteration was made in the case of *U. S. v. Sheer et al.* (R 125) cited in appendix to government's brief, which case was reversed by the Seventh Circuit.

- 4 -

"private books and records" since they were required to be kept by law, and by innuendo that they are therefore not protected by the Fourth and Fifth Amendments to the Constitution of the United States. In support of this proposition they cite three cases: (Shapiro,² involving the exercise of wartime powers of the United States to regulate price controls in the public interest; Davis,³ involving a seizure of Government owned gasoline coupons; and, Wilson,⁴ involving the compulsory production of corporate records) and on the basis of these decisions they request this Court to refuse to issue a Writ of Certiorari to review a decision of the lower court which holds that all records required to be kept by Title 26, Sec. 6001, Internal Revenue Code are public records and are therefore subject to compulsory production to be used as evidence in a criminal proceeding.⁵

If this Court would follow the suggestions of the Government, it would, by its refusal to act, determine the constitutional rights under the Fourth and Fifth Amendments of every person required to keep records by the Internal Revenue Code and would destroy the constitutional right of every taxpayer, i. e., to be secure from unreasonable search and seizure and not to be compelled to be a witness against himself in a criminal proceeding.

II. The government concedes in its brief in opposition that the reports and summaries of the government agents who testified in this case were statements which should have been produced. The Court of Appeals of the Seventh Circuit less than three weeks after it denied a peti-

² *Shapiro v. United States*, 335 U. S. 4.

³ *Davis v. United States*, 328 U. S. 582.

⁴ *Wilson v. United States*, 221 U. S. 361.

⁵ Petition, Appendix B, p. 41.

tion for rehearing in this case completely reversed itself and held that government agents' reports were producible. **U. S. v. Berry** (O. B., p. 14).

The same court within a span of six weeks makes these completely divergent pronouncements on the same issue. In **U. S. v. Clancy** (App. Pet., pp. 47-48), it states:

"The next contested issue is whether the trial court erred in refusing to order the Government to produce the memoranda or reports of the government agents pursuant to the 'Jencks' Act, 18 U. S. C. Sec. 3500. . . ."

"We think there is a distinction between the type of case here at hand and those cases in which the Government produce as a witness an undercover agent whose dealings with the accused are the subject of the agent's testimony at the trial. Here the defendants were aware of the identity of the government agents at the time they made the statements which later furnished the basis of the prosecution against them. They were not dealing with undercover agents whose true identity they did not know."

In **U. S. v. Sheer et al.** (O. B., p. 27), it holds:

"We have held that this Act applies to government agents who testify for the prosecution in federal criminal cases. **U. S. v. Berry**, P. 2d, No. 42822, May 2, 1960.

"We find that the term 'statement' as used in the Act applies to the reports made by the agents in this case. A report is defined as 'a statement in writing of proceedings and facts exhibited by an officer to his superiors'. Webster's Dictionary."

This court's concern for the uniform administration of justice to all litigants demands that this Petition for Certiorari be allowed.

Despite the fact that the Seventh Circuit has recognized the error of its ruling in the instant case in two subsequent decisions⁶ as to the applicability of Title 18, U. S. C., Sec. 3500, the conflict still remains in the Circuits⁷ and is now compounded by a conflict in the Seventh Circuit, itself.⁸

This is a case which screams for justice and only this court can grant it.

The Government recognizes the error in this case but attempts to wrap the tattered garment of "harmless error" about it. This case cannot be equated with **Rosenberg v. U. S.**, 360 U. S. 371. In the Rosenberg case, the defendant demanded a copy of a statement, the original of which was already in his possession, and further demanded a statement which would only have confirmed the damaging admissions made by the witness on the stand, and in no way could have been designated as an impeachment document.

The petitioners accepted the notes of those agents who made note because they could not get the statements. The notes of an agent are no more his complete and finished statement than the "chicken scratches" on the napkin of

⁶ *U. S. v. Berry*, No. 12,822 (Gov't. App. p. 14); *U. S. v. Sheer et al.*, Nos. 12,826-12,828 (Gov't. App. p. 22).

⁷ *U. S. v. Clancy et al.*, 276 F. 2d 617 (7th Cir.); *Johnson v. U. S.*, 269 F. 2d 72 (10th Cir.); *Borges v. U. S.*, 270 F. 2d 332 (D. C. Cir.); *Tillman v. U. S.*, 268 F. 2d 422 (5th Cir.), which hold that the defendant is not entitled to the memoranda of government agents, and on the other hand *U. S. v. O'Connor*, 273 F. 2d 358 (2nd Cir.); *U. S. v. Holmes*, 271 F. 2d 635 (4th Cir.); *U. S. v. Prince*, 264 F. 2d 850 (3rd Cir.), and *U. S. v. Berry*, No. 12,822 (Gov't. App. p. 14), and *U. S. v. Sheer et al.*, No. 12,826 (Gov't. App. p. 22), which hold that the defendant is entitled to the memoranda and reports of government agents after they have testified pursuant to Title 18, U. S. C., Sec. 3500.

⁸ *U. S. v. Clancy et al.*, *supra*, and *U. S. v. Sheer et al.*, *supra*.

an after dinner speaker is the speech of that speaker. When the demand is for memoranda, reports and summaries, the production of notes is no compliance with the statute.

The government in claiming that the production issue relates only to the false statement counts, and not the tax evasion and conspiracy counts, forgets about *United States v. Beacon Brass Co.*, 344 U. S. 43, which holds that false oral statements to treasury agents may constitute the crime of tax evasion. Moreover, the interview with Kastner on May 6, 1956, discussed, inter alia, the partnership, the members thereof, the records and who kept them, the extent of Kastner's activities as a partner, if any, all of the matters which the government alleged and introduced as evidence to sustain the charge of wilfully attempting to evade in Count IV and conspiring to evade the wagering tax in Count V.

While the testimony given in the interviews on December 13 and 14, 1956, was the basis of the false statement charge, the alleged false statements of the petitioners as to their having no other employees or agents permeates Counts IV and V and every subparagraph thereof.² The Petitioners' defense in this case was that the statements were not false and that all the agents and employees referred to were in fact independent contractors operating an independent business; that the bets taken by these individuals and placed with these petitioners were layoff bets;

² For example, Count IV, subparagraph 3, accuses the defendants of concealing lists of agents; Subparagraph 4 accuses the defendants of concealing and covering up the scope and extent of the wagering business; Subparagraphs 5, 6 and 7 allege the false statements and these are alleged as proof of the attempt to defeat and evade a large portion of the Federal Excise Tax. Count V is identical. It inferentially and specifically refers to the false statements, and then in Subparagraph 4 of Count V incorporates the allegations of Counts I through IV, inclusive, as additional overt acts in Count V.

and, the petitioners, accepting the law at its face value believed the original acceptors of the layoff bets were liable for the tax and that, therefore, the petitioners, themselves, were not guilty of the requisite wilfulness and intent to evade. Even the court's instructions has as part of their evidentiary basis the substance of the interviews which the government now wants to restrict to Counts I-III.¹⁰

The government pulls a heavy oar when it argues that this error was not prejudicial. The Seventh Circuit, itself, now rejects this argument. Schnackenberg, Circuit Judge, states in **U. S. v. Sheer et al.** (O. B., pp. 28-29):

"Substantial error was committed in the non-production of the reports of Edwards and Yerly for use by defendants in their defense in the district court. It is not proper for this court to determine whether defendants were prejudiced by failure to make available to them the prior statements of Yerly and Edwards any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness' testimony in open court. *Bergman v. United States*, 253 F. 2d 933, 936. A reversal of the judgment is required. A remandment for a new trial will be ordered."

¹⁰ For example, in the court's instructions found in Appellants' Appendix, p. 173: "There are certain circumstances which you may consider as pointing to whether or not the defendants had the intent to and did attempt to evade or defeat the payment of the excise tax on wagers. . . . *covering up sources of wagers, . . . any conduct the likelihood of which would be to mislead or conceal.* I give you these instances simply to illustrate the type of conduct from which you may infer intent to evade taxes." In Appellants' Appendix, p. 172, the court instructed on layoff bets which inadequately presented the petitioners' position that the statements were not false, but that the so-called agents and employees were, in fact, independent bookmakers laying off to the defendants.

— 9 —

CONCLUSION.

It is respectfully submitted that the Brief for the United States in opposition only reaffirms the conclusion that in order to assure these defendants their rights under the Fourth and Fifth Amendments, and in order to prevent a gross miscarriage of justice, the petition for certiorari should be granted.

Respectfully submitted,

PAUL P. WALLER, JR.,

JOHN F. O'CONNELL,
214 Murphy Building,
234 Collinsville Avenue,
East St. Louis, Illinois,
Counsel for Petitioners.

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BRIEF FOR THE PETITIONERS.

OPINION BELOW.

The opinion of the Court of Appeals (R. 213-240) is reported at 276 F. 2d 617.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 24, 1960 (R. 240). A Petition for Rehearing was denied on April 14, 1960 (R. 241). The Petition for a

Writ of Certiorari was filed on May 13, 1960, and was granted on June 27, 1960 (R. 241). The jurisdiction of this court was invoked under 28 U. S. C. A., Sec. 1254 (1).

QUESTIONS PRESENTED.

I. Whether books and records customarily kept by Petitioners in their business of accepting wagers on horse races (where they have prepared and filed with the District Director of Internal Revenue the special tax return and application for registry; paid the special \$50.00 occupational tax; received their wagering stamp; filed monthly reports of wagers accepted by them and paid a 10% tax on wagers so reported) are protected by the Fourth and Fifth Amendments to the Constitution of the United States from search and seizure for the purpose of being used as evidence in a criminal trial against them.

II. Whether private books and records, which are customarily maintained in the orderly conduct of the wagering business, lose their status as private books and records, so as to be seized and used in evidence against them in a criminal prosecution, notwithstanding the Fourth and Fifth Amendments to the Constitution of the United States, because Title 26, U. S. C., Sections 4403, 4423, and 6001, and U. S. Treasury Regulations 325.32 require books and records to be kept by persons reflecting the amount of income and wagering tax due the United States.

III. Whether after a government agent has testified for the government, the government is required to produce the statements, memoranda and reports of the government agent, either signed or adopted by him and which are relevant to the subject matter of his testimony, upon the demand of the defendant's attorney made prior to cross-examination of the government agent, pursuant to Title 18, U. S. C., Sec. 3500 (The Jencks Act).

**AMENDMENTS TO CONSTITUTION OF
UNITED STATES.**

Amendment IV (App. 59).

Amendment V (App. 59).

**STATUTES, RULE AND REGULATION
INVOLVED.**

Title 18, U. S. C., Section 1905 (App. 59).

Title 18, U. S. C., Section 3500 (a), (b), (c) (App. 60).

Title 26, U. S. C., Section 4403 (App. 61).

Title 26, U. S. C., Section 4423 (App. 61).

Title 26, U. S. C., Section 6001 (App. 61).

Title 26, U. S. C., Section 7201 (App. 61).

Title 26, U. S. C., Section 7213 (App. 62).

U. S. Treasury Regulations 325.32 (a) (b) (App. 62).

Federal Rules of Criminal Procedure 41 (b) (App. 63).

STATEMENT.

On July 25, 1957, a five Count Indictment was returned in the United States District Court for the Eastern District of Illinois. Count I charged Petitioner, Thomas Clancy, with knowingly and wilfully making a false, fictitious and fraudulent statement and representation of a material fact to Internal Revenue Agents, Martin O. Mochel and Wilbur L. Buescher, on or about December 13, 1956, in violation of Title 18, U. S. C. 1001 (R. 24) of which the jury found him guilty. Count II charged Petitioner, Donald Kastner, with knowingly and wilfully making a false statement to Special Agent George W. Kienzler on May 6, 1957 (R. 24-25); however, Petitioner Kastner was acquitted by the Jury of this charge (R. 188). Count III charged the defendant, James Prindable, with knowingly and wilfully making a false, fictitious and fraudulent statement to Internal Revenue Agents, Mochel and Buescher on December 14, 1956 (R. 25-26). He too was found guilty of this charge but did not join in this Petition. Count IV charged petitioners, Clancy and Kastner, and defendant, Prindable, with wilfully and knowingly attempting to evade and defeat a large portion of the wagering excise tax due and owing by said defendants, equal to 10% of the amount of said wagers (Title 26, Sec. 7201) (R. 26-29), of which the jury found them guilty. Count V charged petitioners, Clancy and Kastner, and defendant, Prindable, with conspiring to defraud the United States in the administration of certain Internal Revenue Laws (Title 18, U. S. C., Sec. 371, R. 29-32), of which the jury found them guilty.

The facts pertinent to the questions presented to this court are as follows:

On May 6, 1957, and for several years prior thereto, the Petitioners were engaged in the business of accepting

wagers on horse races, under the name of the North Sales Company, a partnership (R. 103, 123), and each year that they were so engaged in this business, petitioner, Clancy had an accountant prepare and file with the District Director of Internal Revenue at Springfield, Illinois in behalf of North Sales Company, a Special Tax return and application for registry-wagering, Form 14-C (F. S. Ex. 11-14, R. 85); stating that they operated "at large" (R. 85-87; 140 and 141); paid the \$50.00 occupational tax; and were issued their wagering stamps pursuant to said application (R. 142; R. 158). Defendants introduced in evidence their wagering stamps for the fiscal years 1955-1956 and 1956-1957 (Def. Exs. 1 and 2; R. 158). The stamps provided on their face that if a person had no principal place of business that he should carry it on his person. Only one stamp was issued for all 3 partners. The petitioners' accountant filed, with the Internal Revenue Department, monthly reports of wagers received by North Sales Company and paid a 10% tax on the amount of wagers so reported (F. S. Exs. 1-10, R. 84).

On May 6, 1957, Internal Revenue Agents went to a second floor apartment known as 2300a State Street, East St. Louis, Illinois, which was one of the places at which Petitioners were conducting their wagering business that day, and said agents conducted a 3 hour search of the whole apartment under the purported authority of a search warrant (R. 19-21). At the time Internal Revenue Agents Kienzler and Minton arrived at said premises and before they commenced their search of said premises, the petitioner Kastner was present and was questioned by said agents, and he informed them that the North Sales Company, a partnership, had a wagering stamp, and that Thomas Clancy took care of it (R. 93). Although Agent Kienzler testified that Petitioner Kastner stated that he was waiting for "one or more phone calls" (R. 93), no arrests were made at 2300a State Street at the time of the

search (R. 98). The Agents, despite Kastner's statement, searched said premises and took books, records and documents from inside a buffet and a bottom drawer of a sewing cabinet, and from certain boxes located in said premises, all of which were listed in their return of the search warrant (R. 21-23). Information taken from the Petitioners' books and records seized and listed in the return of the search warrant was presented to the Grand Jury, which was then sitting in the Eastern District of Illinois, and subsequently, said Grand Jury returned an indictment (R. 24-32) against these defendants. The information which was presented to the Grand Jury was taken from the items listed as 1 through 15 inclusive, of the search warrant (R. 41-42).

During the trial the books and records of the Petitioners which were marked as Government's Exhibits 54 through 109 were offered and admitted into evidence on the testimony of George W. Kienzler (R. 90-92) that these were the items seized by him on May 6, 1957.

On August 14, 1957, the Petitioners filed a Motion for Return of Property and to Suppress the Evidence seized by the search warrant (T. 15). The Motion for Return of Property and to Suppress Evidence was supported by exhibits and an affidavit (R. 37-40), and subsequently, a Stipulation was entered with the U. S. Attorney (R. 41-42) agreeing as follows: that some of the information taken from the books and records seized and listed in the return of the search warrant was presented to the Grand Jury which was then sitting in the Eastern District of Illinois; that said Grand Jury subsequently returned Indictments against these defendants; that all of the books and records seized were the partnership property of the defendants (except to the extent that they may come within the exception of Sec. 7302, Internal Revenue Code 1954) and were listed as items 1 through 15, inclusive, in the return

of the search warrant for the second floor premises (R. 21-23).

The District Court overruled Petitioners' motion (R. 43, 48-53). The Petitioners again filed the same motion at the opening of the trial of this cause, and after the jury had been sworn (R. 36-37), which motion was again overruled by the court.

During the progress of the trial as the records were offered into evidence, Petitioners objected on the ground, among others, that these were private books and records protected from search and seizure by the Fourth and Fifth Amendments to the U. S. Constitution, but the objections were overruled (R. 90-92 and 159). These records of the Petitioners were used by Internal Revenue Agent Martin Mochel to determine their method of bookkeeping (R. 144) and to calculate the tax allegedly evaded by these Petitioners (R. 144-148) and they were the basis for his preparation of Government's Exhibit 115 (R. 145-146) which Agent Mochel stated was a worksheet showing his computations of Government's Exhibits 54 through 79.

Agent Mochel's computations as to the gross amount of wagers, \$103,441.30, received by North Sales Company during the month of March, 1957, was contained in U. S. Exhibit 115, (R. 146) and was the exact figure alleged in Count IV of the Indictment (R. 26-29).

In affirming the conviction in the trial court, the court below held that the books and records of the Petitioners were not protected against search and seizure under the provisions of the Fourth and Fifth Amendments because: (A) "they were a part of the outfit or equipment actually used to commit an offense" (R. 228) and, (B) they came within the "required records exception" because the records concerning the operation of the wagering business were required to be kept by persons engaged in that busi-

ness under the provisions of 26 U. S. C., Secs. 4403, 4422, 6001, and U. S. Treasury Regulations 132, Sec. 325.32; and were, therefore, not "private papers" (R. 229 and 230).

The witnesses whom the Government alleged were the agents of the North Sales Company in accepting bets were all independent operators of taverns, and each one testified in substance that they laid off bets to the North Sales Company: Marlin Behnen (R. 113), Harry Biernian (R. 114); Leo Klimas (R. 116); John Kukorola (R. 117) and Lawrence Buklad (R. 118).

During the trial, Frank Hudak, a lawyer and supervisor of a group of special agents in East St. Louis, stated that the person accepting the bet in the first place is liable for the tax unless he shows on the return he laid it off (R. 108). Norman J. Mueller, Special Agent of the Intelligence Service at East St. Louis, Illinois, also stated (R. 11), "When a bet is placed with one man and he turns the whole bet over to another, that is a layoff bet, and on such a bet as that the initial acceptor is liable for the tax provided he didn't keep a record of it." Agent Wilbur Buescher, an auditor for the Internal Revenue Department, stated (R. 105) "the person who originally accepts the wager must pay the wagering tax on layoff bets."

Internal Revenue Agents Ira L. Minton (R. 96-99); Wilbur Buescher (R. 99-104), Frank Hudak (R. 104-108), Norman Mueller (R. 109-111) and Martin Mochel (R. 142-150), among others, testified on behalf of the Government. Ira L. Minton testified (R. 97) as to his knowledge of the interview conducted by George W. Kienzler of petitioner Donald Kastner (R. 92-93). After his testimony in chief, prior to cross-examination, a demand was made by the defense for the production of any statements and reports made by the witness for the purpose of inspection and to be used to facilitate the cross-examination of said witness

(R. 97). The trial court ruled "the request will be allowed insofar as Ira Minton wrote down contemporaneously with the making of any statement of the defendant Kastner to this witness. The request will be denied if the defendant is demanding any report this witness Minton made to his superiors or his superior officer subsequent to the conversation with the defendant Kastner" (R. 97). Agent Minton admitted making a memorandum after the interview, and that the memorandum concerned the conversation that he related on the stand (R. 97).

Agent Buescher in his direct testimony for the Government testified as to his interview with Petitioner Clancy on December 13, 1956, during which Clancy was interrogated as to the applications for the federal wagering stamp and on all phases of the operation of the business, including the names of their agents (R. 100). Agent Buescher also testified as to the interview on December 14, 1956 with Prindable and Petitioner Kastner (R. 100). According to Buescher, Prindable did most of the answering and they were interrogated on their respective duties in the partnership; how they accepted wagers; whether or not there was any credit betting, and if they laid off to other "books" (R. 101). After the conclusion of Buescher's testimony, a demand was made for the memorandum prepared by him of the transactions that occurred on December 13th and December 14th of 1956 (R. 101). He admitted that he prepared and signed the statement regarding the interviews (R. 102). The court refused the demand after Buescher had answered the court's questions to the effect that he didn't take any longhand notes at the time the statement was made, and that he prepared his report and submitted it to his superior after he returned to his office (R. 102).

Agent Hudak testified that he was familiar with the testimony regarding certain interviews held with the de-

tendants and the records which were seized at 2300a State Street; he testified that he supervised the agents conducting the raid and that he also was present at the interview on July 23, 1957 when an interview was conducted by him, Agent Mueller, the U. S. Attorney, and Asst. U. S. Attorney with Petitioner Kastner; that he made notes of the latter interview and later prepared a report of the same (R. 105-106). A demand was made for the statement or memorandam and notes made by him (R. 106). In this particular instance, the court allowed the demand (R. 107). Agent Mueller testified that he was also present at the interview on July 23, 1957, and that he made notes of the interview. Upon demand, the court granted permission to examine his notes. (R. 110).

Agent Martin Mochel testified that he was present at an interview which he and Agent Buescher conducted with Petitioner Clancy on December 13, 1956, and with Prindable and Petitioner Kastner on December 14, 1956. He also testified that he prepared a memorandum which was signed by him from notes which were taken by him at the time of the interview (T. 301-302). Upon demand by counsel for the petitioners, the court again held that "only longhand notes made by the witness at the time of the interview will be turned over to the attorneys for the defendants" (T. 302-303).

SUMMARY OF ARGUMENT.

I.

As a result of a three hour search on May 6, 1957 conducted by Internal Revenue Agents, under the purported authority of a search warrant attempting to authorize the seizure of instrumentalities of the crimes of a) failing to file the application for registry-wagering, and, b) failing to pay the \$50.00 occupational tax, the private records of the Petitioners were seized from an apartment at 2300a State Street, East St. Louis. They consisted of:

(A) A daily record listing the name of each bettor, the amount that was bet, what payment was due to the bettor, if any, and the net profit or loss on each transaction, together with a total of all bets received for a particular day, and the profit or loss for each day for March, April and May 1 to 4, 1957;

(B) A record of the gross profit of the business for each month that Petitioners were in the business;

(C) Bet slips and race results, and a recapitulation of all layoff bets placed with them by each layoff bettor for the month of April and May 1st to 4th inclusive of 1957 (none were seized for the month of March);

(D) Paid telephone bills.

Information from these records was presented to the Grand Jury which indicted them, not for the charges set out in the search warrant, but for attempting to evade the 10% tax on wagering; conspiracy to commit that crime, and the making of false statements to Internal Revenue Agents.

This case stands "on all fours" with an income tax evasion case, since it is prosecuted under the same section of the Code, 26 U. S. C. 7201.

Petitioners' rights under the IV and V Amendments to the Constitution were violated since the private papers constituted at most only evidence of the crimes charged in the Indictment. If the papers seized can be held to be the means of committing an offense of attempting to evade the 10% wagering tax, then any person subject to the income tax is liable to have all his papers ransacked and his home or business invaded under the purported authority of a search warrant. If the lower court was right in saying that these were papers that could be seized because they came under the "required records exceptions," then every person in the United States who is subject to the income tax law, or any other tax imposed by the Internal Revenue Code, is also subject to having his private papers seized under the same exception, even though, as in this case, the crimes alleged in the search warrant had not, in fact, been committed.

The Petitioners had been engaged in the wagering business for approximately four years prior to the seizure of May 6, 1957, and each year they filed their application for registry-wagering, and paid the \$50.00 occupational tax. In their registration, they stated that they were partners, along with James Prindable, doing business as North Sales Company, and that they operated "at large" and that Charles Kastner was their agent. Wagering stamps were issued to them pursuant to this "at large" application. Approximately 4½ months prior to the seizure Petitioner, Clancy, informed Internal Revenue Agent Buescher that they had no particular place of business, and the address, 2401 Ridge Avenue, was the address of his personal residence. Petitioner Clancy filed monthly reports of the wagers received by North Sales Company, and paid the tax reported to be due thereon. Internal Revenue Agents observed Charles Kastner and James Prindable entering a door leading to the premises at 230a State Street on several occasions, and on one occasion "Jim" entered this

door carrying a canvas sack similar to sacks furnished by banks to carry money. Principally upon this information, the Internal Revenue Agents applied for a search warrant for the premises.

1. We say that the Government had no probable cause for believing that the crimes alleged in the search warrant were being committed in the apartment at 2300a State Street. The only logical conclusion from the facts was that the partnership of the North Sales Company was operating at that location on the various days.

2. However, even if there had been probable cause—which we deny—there could not have been any authority to seize anything under the authority of the search warrant because: (a) the crimes alleged in the search warrant had not, in fact, been committed, therefore, there could be no instrumentality of a crime not committed; and (b) it was a general warrant and called for the seizure not of instrumentalities of a crime, but of evidence to prove the commission of a crime, which is prohibited, **Harris v. U. S.**, 331 U. S. 145, and (c) there are no instrumentalities for failing to register and pay the tax, since these are only crimes of omission and not commission. Only the failure to act would be the means by which these crimes could be committed.

3. Before Agent Kienzler executed the search warrant he was informed by Petitioner Kastner that the North Sales Co. was operating at this apartment and that they had a stamp. Kienzler was apparently satisfied that no crime was committed because Kastner nor anyone else was arrested. Therefore, the seizure of the property in this case could not be justified as incidental to an arrest as in **Abel v. U. S.**, ... U. S. ..., 80 S. Ct. 683. When Kienzler determined that the crimes alleged in the search warrant had not been committed, he should have left the premises immediately. Nonetheless, he proceeded to conduct an

exploratory search of the whole apartment for evidence of some other crime as condemned by this court in **U. S. v. Lefkowitz**, 285 U. S. 452, 52 S. Ct. 420.

4. The seizure of a man's private books and papers and their use in evidence against him is not substantially different from compelling him to be a witness against himself, and this seizure and use in evidence of Petitioners' records in this case is a violation of their rights under both the IV and V Amendments to the Constitution of the United States. **Boyd v. U. S.**, 116 U. S. 616. This court held in **U. S. v. Lefkowitz**, 285 U. S. 452, 52 S. Ct. 420, that where a man's papers were wanted by the officers solely for use as evidence of a crime of which he is suspected, that the papers could not be lawfully searched for and taken even under a search warrant: (A) issued upon ample evidence; (B) precisely describing such things; and (C) disclosing exactly where they were. This case is governed by the rules laid down in **Boyd** and **Lefkowitz**.

A.

1. Rule 41 (b) of the Federal Rules of Criminal Procedure, which provides that property may be seized which is the means of committing a crime, must be construed so as not to conflict with the property protected from compulsory seizure by the IV and V Amendments and the decisions of this Court defining these rights, otherwise it is unconstitutional. The only property which may be seized under the authority of a search warrant is that which is the instrumentality for the commission of the crimes alleged therein. **Harris v. U. S.**, 331 U. S. 145. This, of course, presumes that a crime has been committed. In the instant case, since the crimes alleged in the search warrant had not in fact been committed, there was no authority to seize any property.

2. Since the crimes alleged in the search warrant were the failure to register and the failure to pay the occupational tax, nothing could be seized since these are crimes of omission and not commission and there can be no instrumentality for the commission of a crime of failing to act.

3. Petitioners had complied with all federal laws requiring registration of their wagering business and had paid the occupational tax. Their conduct of the wagering business constituted the violation of no federal crime and only an instrumentality of committing a crime against the United States is contemplated by the language of Rule 41 (b) (2), Federal Rules of Criminal Procedure. (*Conyer v. U. S.*, 80 F. 2d 292), and possession of these records was not prohibited by federal law.

4. Even if the books and records of Petitioners were the instrumentalities for committing the crime of attempting to evade the payment of the 10% wagering tax—which we emphatically deny—they still would not be subject to seizure for two reasons: 1) they are not the means of committing the crimes alleged in the search warrant—these crimes were not in fact committed—and, 2) they were not even purportedly seized as incidental to an arrest.

5. We say that the instrumentality for the commission of the crime of attempting to evade the payment of the wagering tax for March, 1957, was the false return for that month which was filed on April 26, 1957. "Means" is the instrument or agency through which an end or purpose is accomplished. The wagering tax, like the income tax, is a self-assessed tax and is based upon information supplied to the government. This false information could be supplied whether the Petitioners' records were in existence or not. Once the false information is filed, the crime is complete and their records are simply evidence of whether they have reported falsely or not.

6. Although we have discussed the property of the Petitioners under the general term of private books and records, and we have proved that none of them were subject to seizure and use in evidence against Petitioners, this is a greater burden than we need assume. If any of the papers were not subject to seizure and use in evidence, then this case must be reversed. Our position is that none could be so classified. Certainly, however, the records for April and May compiled **after** the alleged false report for March had been filed were not instrumentalities of any offense in the indictment. They were not even evidence, nor can the bet slips for April and May recorded **after** the filing of the alleged false return be considered the means of committing an offense that had already been committed.

B.

The lower court held that the records of Petitioners were not protected from seizure and use in evidence against them because they were "records required to be kept by law." As authority for its holding, the court relied on **Shapiro v. U. S.** 335 U. S. 1. We say that the holding in **Shapiro** is limited to the facts in that case and is not controlling here.

1. We say that the case which is controlling on this point is **Boyd v. U. S.** 116 U. S. 623. In **Boyd**, the respondents record was sought to be obtained by compulsory process in order to prove his guilt of a fraud upon the revenue. Although the record was "required to be kept by law", this court held that it was a private paper and subject to the protection of the IV and V Amendments, and that it saw no difference between seizing a man's private papers to be used against him and compelling him to be a witness against himself.

2. The **Shapiro** case, which held that the records required to be kept by the Emergency Price Control Act

were public records is not controlling here because of these fundamental differences with the case at bar:

A. The **Shapiro** case rose out of the wartime powers of the government where the O. P. A. Administrator was given absolute power to regulate or prohibit businesses, in the public interest, for the successful prosecution of the war. The wagering business is not a subject of governmental regulation. The wagering act was passed as a revenue measure and its constitutionality was upheld on this ground. **U. S. v. Kahriger**, 345 U. S. 22.

B. In **Shapiro**, the keeping of records was absolutely essential for the regulation of the businesses subject to the act for the purpose of enabling the administrator to issue regulations, orders and price schedules. In the instant case, the only purpose for requiring records to be kept was to determine whether or not a person had paid the correct amount of tax, just as in the case of income tax, which is governed by the requirements of the same Section, Title 26 U. S. C., Sec. 6001.

C. In **Shapiro**, the court found that the keeping of records was for the benefit of the public, since these records established the price to be charged to the public. In the instant case, the records were not kept for the benefit of the public. They contained information relative to income tax and while subject to inspection by an Internal Revenue Agent, the information was private and confidential and the disclosure of it to the public made the agent liable to imprisonment. 26 U. S. C., Sec. 7213, 18 U. S. C. 1905.

D. In **Shapiro**, before a person subject to the act could engage in business, it was necessary that he obtained a license which was subject to suspension. In the instant case, no license was required, and in fact, the government was not authorized to license this business, nor did it pur-

port to. The wagering stamp itself stated that it was not a license.

3. Records do not become public records simply because they are required to be kept by law. In **Shapiro**, this court listed some 25 federal acts which they considered to be governed by the rule laid down, however, at no point was the Internal Revenue Act listed. The Petitioners were not custodians of their records for the benefit of the public, but they were the owners who maintained them for their own purposes, of conducting their business.

4. Title 26 U. S. C., Sec. 6001 requires every person liable for either the payment or the collection of any tax imposed by Title 26, the Internal Revenue Code, to keep such records as directed by the Secretary of Treasury. The lower courts ruling allows the Secretary of Treasury, or his delegate, the right to exclude papers from the protection of the IV and V Amendments by the simple device of enacting a regulation requiring that they be kept. By the administrative act of classifying, the Secretary of Treasury could destroy the right of private ownership of papers. This would authorize the amendment of the Constitution by executive fiat. This is truly the situation feared in the **Boyd** case of placing the liberty of every man in the hands of every petty officer.

II.

The Government has conceded in its brief opposing Certiorari that government agent-witnesses' reports come within Title 18, Sec. 3500 and this position is supported by the Second, Third, Fourth and Eighth Circuits, and now in the Seventh Circuit, which within three weeks after having denied Petitioners' Petition for Rehearing in this case completely abandoned the criteria which is set out in its opinion in the instant case, and substituted

the requirements of the statutes, to-wit: (1) that the witness must have testified on direct examination; (2) that the demanded report must relate to the subject matter of his testimony; (3) that the report must be written or otherwise approved or adopted by him. **U. S. v. Berry**, 277 F. 2d 826; **U. S. v. Sheer**, 278 F. 2d 65.

Government agent-witnesses Minton, Buescher and Mochel each admitted they wrote a report and that it concerned their testimony on direct examination. A demand, pursuant to the statute, was made and refused by the trial court on the ground that these reports were not made contemporaneously with the interviews they recorded. The Trial court, despite the fact that all the requirements of Subsection (e) (1) had been met, insisted on requiring that the requirements of Subsection (e) (2) also be met, which would have been applicable if the person interviewed had testified, but certainly not applicable where the government agent who made the written report was, himself, the witness.

Clearly, these reports are within the statute, and the refusal to order production was error which was highly prejudicial to the defense. The testimony of these witnesses not only went to sustain the proof of Counts I, II and III of the Indictment, which charged the Petitioners and Defendant Prindable with making false statements to government agents, but to Subparagraphs 2, 3, 4, 5, 6 and 7 of Count IV (R. 28 and 29), and each overt act alleged in Count V as well.

Petitioner Kastner's defense throughout the trial was that he was not, in fact, a partner, but merely a clerk. One witness for the Government described him as a "ribbon clerk", and Kastner so described himself as a clerk on the day of the raid when he signed the receipt as clerk for the articles seized. This agent, witness Minton, in his testimony stated that Kastner stated he was a

junior partner, a clerk and a partner. Certainly, on an issue this serious it was important that the defense be able to see what the report of the government agent actually stated. For if Kastner was, in fact, a clerk, he could not have been found guilty under Counts IV and V. **Ingram v. U. S.**, 364 U. S. 672, 79 S. Ct. 1314.

It was important to the adequate defense of these petitioners, to have been granted the clear right under the statute to have the reports produced for purposes of possible impeachment of these witnesses. Only the defense could have determined the effective use that could have been made of these reports. It was prejudicial error of the grossest sort not to order production.

ARGUMENT.

I.

The Rights of the Petitioners Under the IV and V Amendments to the Constitution of the United States Were Violated by the Seizure of Their Private Books and Records, and Subsequent Use in a Criminal Prosecution Against Them.

This is a case where it is impossible for us to feel that the admitted occupation of the Petitioners as gamblers did not influence the trial and lower court in holding, in effect, that the IV and V Amendments of the Constitution of the United States did not protect these Petitioners. No matter how unsavory the business of gambling may be to some, the fundamental principles of constitutional protection cloak the professional gamblers as well as the doctors, lawyers, and all those professions recognized as honorable.

Petitioners were indicted for and found guilty of a violation of 26 U. S. C., Sec. 7201. Historically, this is the charge used to prosecute persons who attempt to evade the payment of income tax. Indeed, we say that this is similar in all respects to an income tax evasion case. The constitutional protection of records should, therefore, be the same in both cases. Nonetheless, the lower court held that the Petitioners' records ordinarily and customarily used by them in carrying on their wagering business were not protected by the guarantees of the IV and V Amendments because they were: a) instrumentalities of the crime of attempting to evade the payment of the wagering tax; and, b) were records "required to be kept by law." It held that all records "required to be kept by law" under the provisions of 26 U. S. C., Sec. 6001, which is the general record-keeping requirement applying to all persons who are liable for income tax, were not protected by the IV and V Amendments.

If the decision in this case is sound law, then every home, and dwelling, every business, large and small, every citizen, no matter how little or how big, is subject to an invasion by the Internal Revenue Department under the guise of a search warrant to seize any and all records that might relate to their income tax and tend to prove a violation thereof. For there is no rule of law announced in this case which would not be applicable to an income tax case.

The Government has never contended before that the private records of a citizen can be seized, and information contained therein be used to indict and convict him of attempting to evade the payment of income tax. Yet the contention is made in this case, since no valid distinction can be made between the facts in this case and a typical income tax violation.

We submit that the lower courts by the simple device of attaching labels have completely stripped from these Petitioners the protection of the IV. and V Amendments.

In order to understand how the constitutional rights of these Petitioners were violated, it is essential for the clear presentation of this argument to examine in some detail the facts surrounding the search and to examine in detail the property seized.

1. The Unreasonable Search and Seizure.

Before the commencement of the search on May 6, 1957, the Internal Revenue Department knew:

That the Petitioners and James Prindable had been engaged in the wagering business for approximately 4 years immediately before this seizure; that for each of these years they had registered as required by 26 U. S. C., Sec. 4412, and paid the \$50.00 occupational tax as required by 26 U. S. C. 4411, and were issued wagering stamps in all three names (Defendants' Exs. 1 and 2, R. 158); that their registration (U. S. Exs. 11-14, R. 85) stated that they

operated as a partnership under the name of North Sales Co.; that they operated "at large" and that Petitioner Clancy's residence address was 2401 Ridge Avenue (R. 100); that Charles Kastner, Jr., was an agent accepting wagers in their behalf; that Petitioner Clancy filed and signed their monthly reports of wagers and paid the tax reported to be due thereon for each month of the fiscal year 1956-1957 (U. S. Exs. 1-10, R. 84); that James Prindable and Charles Kastner, Jr., who also had a wagering stamp, were described as well known bookmakers and had been seen entering the door leading to the apartment at 2300a State Street, East St. Louis, on several occasions, and that on one occasion "Jim" entered the door leading to the apartment carrying a canvas sack similar to sacks furnished by banks to carry money.

It was principally on the information of Prindable and Charles Kastner, Jr., entering these premises, and that they both had wagering stamps that the search warrant was issued. When the warrant was issued, Special Agent George Kienzler took the search warrant to the apartment at 2300a State Street to execute it. When he arrived, and before he executed it, he was confronted by Petitioner Kastner who informed him that North Sales Co. was operating there and that they had a stamp. With actual knowledge of the facts contained in the affidavits for the search warrant and the constructive knowledge of the information on file in the Internal Revenue Office, Agent Kienzler's enthusiasm was still undiminished.

He began rummaging through the buffet and drawers to see what he could find. At no time on that day, while he or any other agent was on the premises, and either before or after the search was any arrest made. He found no contraband, nor any property whose possession was prohibited by federal law. He did find the private books and records of the Petitioners used by them to conduct the wagering business. Lest he leave empty handed, he seized

them. These same private books and records were presented to a Grand Jury which indicted the Petitioners and Prindable. Some of the same papers were introduced into evidence by the government upon identification by Agent Kienzler. Another agent, Mochel, testified at the trial that he examined them in order to determine the manner of bookkeeping, and then made a computation from them of the amount of wagering tax due the U. S. by the Petitioners for the month of March, 1957. This amount was identical with the amount alleged in the indictment.

2. Property Seized.

1. Petitioners' daily record of: wagers received; the amount won or lost to each person; the profit or loss on each transaction; and, the profit or loss for each day, for the month of March, 1957. These records were listed in the return of the search warrant and were seized from the lower right-hand part in the buffet in the apartment at 2300a State Street (R. 89). This is a receipts and disbursement journal ordinarily used in any business.

They were marked as U. S. Exs. 54-79 (R. 90) and introduced into evidence upon the testimony of Agent Kienzler who seized them (R. 90) during the course of a three hour search (R. 21). Agent Mochel testified he examined and studied them, and that he made a computation in regard to them; that they were dated for the month of March, 1957, and are dated consecutively with the exception of Sundays; that he totaled them and that each carried a total at the bottom of each particular sheet (R. 143); that he prepared worksheets which disclosed the totals of the column with respect to those sheets for the month and prepared a worksheet which is Government's Exhibit 115 (R. 144 and R. 146); that according to his computations, the gross wagers accepted for the month of March, 1957, was \$103,441.30 and that the Petitioners had only reported the amount of

\$11,913.50 on the monthly return filed by them for March, 1957, which was U. S. Ex. 9. [These identical figures were alleged in the Indictment (R. 27).]

2. Petitioners daily record of wagers received by Petitioners for the month of April and for May 1, 2, 3, and 4 of 1957. These records were identical to the records listed in Paragraph 1, however, they were for a different period of time. These records were introduced into evidence as U. S. Exhibits 80 through 109 (R. 90-91), and were obtained from either the bottom drawer of the sewing cabinet, or a drawer of the buffet (R. 22-23). Agent Mochel examined U. S. Exhibit 108 and U. S. Exhibits 111 to 111SSS inclusive (R. 144) in order to determine the Petitioners' manner of bookkeeping.

3. A record of gross profit for the North Sales Company prior to distribution to layoff bettors (U. S. Ex. 110) (R. 91).

4. A package consisting of a racing form wrapped around the results of races run the same day, and bet slips for May 3, 1957. The cover of the package was marked as U. S. Exhibit 111 (R. 92) and the contents were marked as U. S. Exhibit 111A to 111SSS (R. 129). The contents were identified by Charles Kastner, Jr. as records of the individual wagers accepted by North Sales Company for May 3, 1957 and bet slips and a recapitulation of bets placed by the various bettors (R. 126-128). Agent Mochel testified that these were bet tickets for May 3, 1957 (R. 144), which he also examined in order to determine the manner of bookkeeping of Petitioners'.

N. B. There were no bet slips seized for the month of March, 1957.

5. A Gordon's Dry Gin carton marked U. S. Ex. 112 (R. 92) which was admitted into evidence on the ground that it was in the same condition at the time it was seized, and which contained 28 racing forms bound into packages

and with contents similar to U. S. Ex. 111. These racing forms were for the month of April, 1957 and for May 1st, 2nd and 4th, 1957.

6. Paid telephone bills which were admitted as U. S. Exhibits 30-53 upon the testimony of Agent Mueller that they were seized by Agent Kienzler and turned over by him to Agent Hudak, who, in turn, delivered them to Agent Mueller (R. 110).

7. Cash and various other papers.

3. Rights Under the IV and V Amendments.

The compulsory seizure of private books and papers of the Petitioners to be used as evidence in a criminal prosecution is prohibited by both the IV and V Amendments, and constitutes an unreasonable search and seizure. **Boyd v. U. S.**, 116 U. S. 616.

Since the crimes alleged in the search warrant had not, in fact, been committed, the private papers of Petitioners were wanted by the Internal Revenue Agents solely for use as evidence of some other crime, and they could not be lawfully searched for and taken even under a search warrant issued on ample evidence and precisely describing such things and disclosing exactly where they were. As this court said in **United States v. Lefkowitz**, 285 U. S. 452, 464:

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. **Gould v. United States**, 255 U. S. 298, 310, 41 S. Ct. 261, 65 L. Ed. 647."

Although the **Boyd case** is a precedent of many years standing, this court in its last term restated the rights of

an individual under the Fourth Amendment to have evidence obtained by an illegal search excluded in a criminal prosecution regardless of who conducted the search and seizure. **Elkins v. U. S.**, 80 S. Ct. 1437.

This court also stated in the **Elkins case** at page 1444;

“Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. **Brinegar v. United States**, 338 U. S. 160, 181, 69 S. Ct. 1302, 1313, 93 L. Ed. 1879 (Dissenting opinion).”

This court recently said in **Abel v. U. S.**, ... U. S. ..., 80 S. Ct. 683, that “the preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.” The rights of individuals under the IV and V Amendments are to be liberally construed in his favor. **Gobart Importing Co. v. U. S.**, 282 U. S. 344.

It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachment thereof. **Smith v. People**, ... U. S. ..., 80 S. Ct. 215.

Certainly, the language of the Fourth and Fifth Amendments leave no room for inference that invasions of these rights can be made just because they are slight. The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and the language “shall not be violated” is a prohibition imposed equally upon the judicial, the legislative and executive branches of our government.

The Fifth Amendment provides that “no person ... shall be compelled in any criminal case to be a witness against himself.” This amendment does not say “some persons”, but says “no person”, and applies with equal

force upon all citizens regardless of their occupation. These Amendments are the supreme law of the land, and have thus fixed their own value of freedom from unreasonable searches and freedom from being a witness against ones self in a criminal proceeding. This is the manner in which this Court discussed the constitutional rights under the I Amendment in **Smith v. People**, ... U. S. ..., 80 S. Ct. 215.

Furthermore, there was another reason why the Petitioners' rights under the IV Amendment were violated. The agents in their affidavits stated knowledge of facts which showed that they could not have drawn the conclusion: that the crimes of failing to register and failing to pay the \$50.00 occupational tax were being committed on those premises. There was nothing in the affidavits of the agents that would have warranted the conclusion they drew. They admitted that they checked the registry (U. S. Ex. 14), and Prindable and Kastner both had stamps (R. 50). The registration which they checked showed the application was an "at large" application. The registration also showed that Prindable was operating as a principal of North Sales Company, and Kastner as an agent; the affidavits showed that they both entered the premises at 2300a State Street within 8 minutes of each other on May 1, 1957 (R. 15), and that on another occasion "Jim" entered the premises carrying a canvas sack similar to sacks furnished by banks to carry money.

The only irresistible conclusion that can be drawn from these facts would be that the North Sales Company was operating, those days from that location. Certainly, when all the facts lead to the opposite conclusion, the agent cannot state that he believes the crime is being committed and have a valid warrant issue on the basis of the affidavits. This point was raised on the Motion to Suppress the Evidence and Return the Property; however, the court overruled the Motion.

A.

Books and records customarily kept by petitioners in their business of accepting wagers on horse races where they have filed an application for registry-wagering, paid the \$50.00 occupational tax, received a wagering stamp, filed monthly reports of wagers accepted by them and paid a 10% tax on wagers so reported are protected by the Fourth and Fifth Amendments to the Constitution of the United States from search and seizure for the purpose of being used in a criminal trial against them, on the grounds that said books and records are merely evidence of an offense as opposed to being property used as the means of committing a criminal offense as provided in Federal Rules of Criminal Procedure, Rule 41 (b) (2).

1. The Motion to Suppress Evidence and to Return Property.

a) **Trial Court.** After the Petitioners were indicted, they filed a timely Motion to Suppress the Evidence and to Return the Property seized, alleging among other things that the search was unreasonable and in violation of their rights under the IV and V Amendments. They were persons who had standing to complain as in **Rios v. U. S.**, ... U. S. ..., 80 S. Ct. 1431. This Motion was supported by an affidavit, exhibits and stipulation. The Government stipulated that some of the information taken from the books and records seized was presented to the Grand Jury which indicted Petitioners (R. 41) and that the exhibits which were attached to the brief could be admitted into evidence. These were photostatic copies of their application for registry-wagering for the fiscal year 1956-1957, and the wagering stamp issued by the Internal Revenue Department for the same period of time. Nonetheless, the trial court overruled this motion on the ground that "the items seized under the authority of the search warrant were used and intended to be used as a means of

carrying on the attempt to defeat and evade the excise tax and thus must be considered as instrumentalities in conducting the illegal operations" (R. 52). The holding of the court restated was: that although the Petitioners were conducting the wagering business with the knowledge and consent of the Internal Revenue Department, because their private books reflected a larger amount of wagers for March, 1957 than reported to the Internal Revenue Department on U. S. form 730, that this made the operation of their business illegal, and their books and records, instrumentalities for conducting this business.

This is similar to and prosecuted under the same section (Title 26, U. S. C. 7201) as all income tax fraud cases. The holding of the court, logically extended to an income tax case, would be that if a person attempts to evade the payment of income tax, and if his records used to conduct his business are accurate and they furnish proof of his fraud—then his business is an illegal operation, and the books used by him to conduct his business are instrumentalities used to conduct an illegal operation, and are not protected by the IV and V Amendments. This holding is erroneous, and it is obvious that the court would not have so ruled if any other business, except gambling, was involved.

b) **Circuit Court of Appeals.** In affirming the trial court's ruling on the Motion to Suppress, the Court of Appeals used a different ground. They did not hold that the private books and records were the instrumentalities in conducting an illegal operation. They obviously recognized that the operation of the Petitioners' wagering business was not an "illegal operation" under federal law. However, they have one thing in common with the lower court—the desire to punish these gamblers who violated the law of Illinois, despite the implicit holding of this court in **U. S. v. Kahriger**, 343 U. S. 22, that Congress had no right to prohibit the wagering business. The court held

that these books and records were "gambling paraphernalia" used in the commission of a crime in violation of 26 U. S. C. 7201, i. e., knowingly attempting to defeat and evade the wagering tax, and were, therefore, subject to seizure (R. 229), even though this was not a crime alleged in the search warrant.

In rationalizing its holding the court, intent upon its dedicated purpose, decided that only evidence of an intention to commit a crime or malum in futuro was protected by the IV and V Amendments, totally in disregard of this court's holding in **U. S. v. Kahriger**, 345 U. S. 22, that the V Amendment applies to past acts and not to crimes that may or may not be committed in the future.

The adoption of the label "gambling paraphernalia" is a dramatic example of how error is created by lifting words out of context. In **Gouled v. U. S.**, 255 U. S. 298, 41 S. Ct. 261, 265, the court, in citing what paper might be considered an instrumentality for committing a crime, said:

" . . . Lottery tickets, under a statute prohibiting their possession with intent to sell them, *Commonwealth v. Dana*, 2 Mete. (Mass.) 329. . . . "

The same circuit that decided this case cited the **Gouled** case in its opinion in **U. S. v. Thompson**, 113 F. 2d 643, stating what property had been held to be instrumentalities for the commission of a crime cited " . . . and lottery tickets . . . " without the qualifying words, "under a statute prohibiting their possession with intent to sell them," and without citing the state court decision showing it arose under state law.

If gambling is not prohibited by federal law, then "gambling paraphernalia" cannot be the instrumentalities for the offense of a violation of 26 U. S. C. 7201 any more than the shoes, hats and merchandise of haberdashery or "mercantile paraphernalia" can be considered the instrumentalities for committing a crime under the same section

if the haberdasher attempts to evade the payment of his income tax.

Without stating it, the court apparently relied for its authority on the provisions of Rule 41 (b) (2), Federal Rules of Criminal Procedure, which provides for the seizure of property which is the "means of committing a crime." However, the crime referred to must be a crime under one of the Federal statutes, **Conyer v. U. S.**, 80 F. 2d 292, and may not be for a crime under the law of an individual state.

Although the lower courts do not deny the privilege against compulsory production of private papers as declared in the **Boyd case**, they have striven hard to classify these private papers of the Petitioners as the "means" of committing a crime. They have attempted by applying a label of "instrumentalities" to these particular papers to find some reason why these constitutional privileges are not available to the Petitioners. The effect of their holdings is to repeal these amendments. The problem here is not what you call these papers, but whether they were (1) private, (2) seized by compulsory process and over objection of their owner, and (3) were solely evidence to prove the guilt of their owner. All three of these requirements are met here and, regardless of what they are called, their use is no different from compelling a man to be a witness against himself, and constitutes a violation of his rights under the V Amendment. The rights of partners in partnership papers are the same. Black's Law Dictionary, 3rd Edition, defines "means" as follows: "The instrument or agency through which an end or purpose is accomplished." What then were the instrumentalities for committing the crimes charged in the a) search warrant and b) the Indictment?

2. The Search Warrant.

a) The Court issued a search warrant purportedly authorizing any special agent of the Internal Revenue De-

partment to seize from that place property described in the warrant and which was designed and intended for use, which have been and are used in the conducting and carrying on of said wagering business on said premises, and designed and intended for use and which have been and are now being used as a means of committing divers criminal offenses against the laws of the United States—which were wilfully attempting to evade and defeat a tax of \$50.00 on anyone engaged in the wagering business (26 U. S. C. 4411) and wilfully failing to prepare and file a special tax return and application for registry-wagering (26 U. S. C. 4412).

Agent Kienzler, who executed the warrant, entered the premises on the purported authority of the search warrant to seize the instrumentalities, if any so described, for committing the crimes alleged in the search warrant. No property which was merely evidentiary whether described in the warrant or not, could be seized. **Harris v. U. S.**, 331 U. S. 145.

The authority for seizing the instrumentalities of a crime presumes that a crime has been committed. Since the crimes alleged in the search warrant were not, in fact, committed on these premises by Petitioners or anyone else, Kienzler had authority to seize nothing. The Petitioners were not prohibited by federal law from engaging in the wagering business, and the possession of property used by them to conduct this business was not a crime against the United States. Kienzler made no arrest, no crime was committed in his presence, and there was no possession of contraband. Therefore, there was no right to seize any property.

b) Furthermore, the crime committed by a person who engages in the wagering business without registering and paying the tax is his failure to register and to pay the tax, and not his engaging in the business without first having paid it. The violations alleged in the search

warrant are crimes of omission and not of commission. Therefore, even had the Petitioners not registered, nor paid the tax, the search warrant called for the seizure of all records which were evidence and not instrumentalities. The warrant was in effect a general warrant. It is difficult to understand how any property may be used as a means of committing a crime of omission. Indeed, we say that no property can be used to commit these crimes. Once those engaged in gambling operations have begun wagering without registering and paying the special tax, their omissions become past acts and any property used in gambling would, of necessity, be employed after the omissions. The property becomes merely evidence of these omissions and is not used for the commission of these offenses. The possession of such property is not a federal crime, and does not constitute the instrumentalities and means by which any federal crime was committed. This is made clear when we consider the nature of the offense here involved. The Gamblers' Occupational Tax Act did not place a license upon gambling. Rather, it imposed a tax and certain registration requirements in connection with gambling activities. Implicit in **United States v. Kahriger**, 345 U. S. 22, which upheld the validity of the Act, is the premise that Congress had no power to regulate the business of gambling as such.

3. The Indictment.

Since no legal arrest was made in this case on the premises, the seizure must depend upon the authority of the search warrant. It is impossible, therefore, to reconcile the opinions of the lower courts authorizing the seizure of evidence of a crime totally different from that alleged in the search warrant. Nonetheless, it is inconceivable that the private books and records which were seized could be the instrumentalities for the crimes alleged in the Indictment.

The crime alleged in the Indictment was the wilful attempt to evade the payment of the 10% tax imposed on wagers (26 U. S. C. 4401) accepted by Petitioners during the month of March, 1957. By what means was this crime allegedly committed? Obviously, by filing false returns at the office of the Collector of Internal Revenue and misrepresenting the amount of tax actually owed, and no foray into the field of tortuous semantics can change this obvious fact.

How can it reasonably be said that books and records revealing the true state of the wagering business could be the instrument by which the purpose of evading the tax is accomplished? The only purpose of these books and records would be evidence to show the true and actual amount due, that is, evidence that the instruments or means previously used were false and corrupt.

If the false monthly report is filed, the crime is committed. The instrumentality or agency is in existence when the false report is prepared and sent to the Collector. If a false report is not filed, there is no crime accomplished. In both instances, the books and records serve the same capacity to prove or give evidence to the fact that the report is false or give evidence to the fact that the report was correct. In either case, they only exist as evidence. If there had been no books and records maintained, there still would have been a crime committed of attempting to evade the tax, but without the filing of the false report, the crime charged would not come into being.

If the government had made its proof by the books and records of the individual tavern owners, or by their oral testimony as to the amount of bets they allegedly laid off with the North Sales Co., would it seriously contend that the books and records of the tavern owners, or their oral testimony, was the instrumentalities of the offense? The wagering tax, just as the income tax, is a

self assessed tax. Persons who are subject to this tax, after registering and obtaining a stamp are supplied forms by the Internal Revenue Department, which have the name of the taxpayer and his wagering stamp number printed on them (U. S. Exs. 1-10). The taxpayer is required to fill out the blanks on the government forms and report the amount of wagers accepted by him (Int. Rev. Reg. 325.25 (a)). He computes the amount of tax due and forwards the form along with his check for the tax to the District Director of Internal Revenue. Therefore, if there was any attempt by these Petitioners to evade the payment of the tax, this was accomplished by inserting false information on the government form, mailing the same and thereby decreasing their liability, and necessarily the instrumentality for wilfully attempting to evade the payment of wagering tax in this case would be the filing of the false monthly report, U. S. Form 730 (U. S. Ex. 10).

A case very similar to the case at bar was **Takahashi v. U. S.**, C. C. A., 9 Cir., 143 F. 2d 118. In that case, the defendants were charged with a conspiracy to violate an executive order by designating China as a country of destination on an application for a license to export certain storage tanks, when, in fact, Japan was the country of ultimate destination, and they were also charged with making false and fraudulent statements in an application in a matter within the jurisdiction of the Department of Justice. They moved to suppress certain documents seized by custom officers including code telegrams, letters, and other documents that indicated that the destination of the tanks, to be exported, was not China, and that the real purpose was to deliver the tanks to Japan. The Court of Appeals in holding that the motion to suppress should have been sustained by the trial court overruled a contention that the papers were more than mere evidence, but were themselves the instrumentalities of a crime. The court held that while the application for the

license, itself, would be an instrumentality for the commission of a crime, the tanks themselves and the papers taken from defendants were mere evidence of an intention to commit crime under both the substantive counts.

This Court in the case of **U. S. v. Lefkowitz**, 285 U. S. 452, 52 S. Ct. 420, condemned the practice of conducting a general exploratory search of the premises incidental to the arrest of the defendant. After the arrest was made, the prohibition agents who accompanied the Deputy Marshal opened all the drawers of the desks located in the premises, examined their contents, and took therefrom and carried away books, papers and other articles. They also searched the towel cabinet and took papers from it along with contents of the baskets. The court in holding that the search and seizure was unreasonable said that the papers which were seized were not contraband as in the case of **Carroll v. U. S.**, 267 U. S. 132, 45 S. Ct. 280. This Court said in **Lefkowitz**, 285 U. S. 452, 52 S. Ct. 420, 423:

"The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrest. And that must be decided on the basis of valid arrest under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondent's guilt of crime, **whether that specified in the warrant or some other offense against the Act.** Their conduct was unrestrained. The lists printed in the margin show how

numerous and varied were the things found and taken" (Emphasis supplied).

That case is also similar to the case at bar in that the crimes alleged in the search warrant were not committed by the defendants, and no crime was committed in the presence of the searching officers for which an arrest was made.

In **Gould v. U. S.**, 255 U. S. 298, this Court reasoned that the purpose for allowing the seizure of property was to prevent the commission of a future crime by the use of the instrumentalities seized. We say that this purpose would be the same in a seizure under authority of a search warrant or as incidental to a lawful arrest.

It is clear that the seizure in this case, when measured by that purpose, falls short. The seizure of the private books and records of the Petitioners did not, nor could not, prevent the future commission of crimes alleged in the search warrant, i. e., failing to register and pay the \$50.00 occupational tax. The Petitioners could not have committed these crimes at the time of the seizure by any means—since they had already complied with this federal statute in this respect, and because their records were merely evidence of their operation for past months.

Likewise, since the attempt to evade the payment of the 10% tax alleged in the indictment was committed by furnishing false information on government forms—the possession of Petitioners' books and records were not necessary or a means by which this fraud was accomplished.

To this point, we have referred to all of the property seized by the Government as the private books and records of the Petitioners, and while we say that none of the Petitioners' property was subject to seizure, this is a greater burden than we are required to assume for the purpose of showing that reversible error has been com-

mitted. If any of the property seized and introduced into evidence was in violation of the Petitioners' rights under the IV and V Amendment, then this case must be reversed.

Without abandoning our previous argument, we will now show how some of the property seized could under no stretch of the imagination be considered as instrumentalities for the commission of the crime of wilfully attempting to evade the payment of the wagering tax for the month of March, 1957.

1. U. S. Exhibits 54 through 79 (R. 91) were the records of the Petitioners for the month of March, 1957, showing the wagers received and the outcome of the individual bets. Each exhibit number was a record of the transactions for a particular day. The amount of wagers received by Petitioners was reported on Internal Revenue Service Form 730, and the report for March was filed on April 26, 1957. Therefore, the recording of the transactions of the day's business for March was actually completed some 26 days before the crime of attempting to evade the tax was committed by the filing of the false return. The compilation of these records had been completed before the crime was committed and were not used as a means of committing it.

2. U. S. Exhibits 80 through 109 (R. 91) were similar to the records in Paragraph 1 above, but they were for the month of April and May 1st, 2nd, 3rd and 4th of 1957. Even if this court would hold that the records for March of 1957 were instrumentalities for attempting to evade the tax for March of 1957, we do not see how records compiled subsequent to that time, and which reflect neither the correctness nor the falsity of the tax reported for March, could be considered as a means of committing that crime.

3. U. S. Exhibit 110 (R. 91) was a record of the gross profit of the North Sales Company for several years prior to the seizure and these do not in themselves constitute a

means by which the crime of attempting to evade the payment of wagering tax for March of 1957 could be accomplished.

4. U. S. Exhibits 111 and 112 (R. 92-93) were the bet slips for the month of April and May 2nd, 3rd and 4th of 1957, all of which were compiled subsequent to the month in question. Even if this court would hold that betting slips for the month of March, 1957 could be the means of committing the crime of attempting to evade the payment of the wagering tax for the month of March, 1957, we do not see how these records, which were compiled subsequent to the month in question, could be the means or instrumentalities for attempting to evade the wagering tax for a previous time. We also point out that these are not "records required by law to be kept", and their seizure, therefore, could not be justified on the alternative theory that they are records "required to be kept by law" and thus excluded from the protection of the IV and V Amendments.

5. U. S. Exhibits 103 to 109 inclusive (R. 90, 91) were records of the Petitioners' conduct of their wagering business for the period April 27th to May 4th inclusive. Therefore, since these records were compiled subsequent to the time that the false report of wagers for the month of March was filed by Petitioner Clancy on April 26, 1957, they were not in existence at the time of the commission of the crime. We say that under no theory can these be considered as instrumentalities for the commission of the crime of attempting to evade the wagering tax for March of 1957.

6. U. S. Exhibit 111 and 6 other packages contained in U. S. Exhibit 112 were the bet slips for the period April 27th to May 4th inclusive, and they were not in existence at the time of the commission of the crime. Even though this court would hold that the bet slips constituted an instrumentality for the commission of the crime of attempt-

ing to evade the wagering tax for March of 1957, or a conspiracy to do so, we do not see how these could possibly be the instrumentalities for the commission of a crime which was completed on April 26, 1957, by the filing of the false return. These records are not records "required to be kept by law" and would, therefore, not come within that theory. We further say that there could be no instrumentality for the conspiracy to commit a crime after that crime has been completed. The only possible way the conspiracy could exist after that time, if at all, would be by the concealment of the fact that the crime had been committed. We say that these are not the instrumentalities for any concealment, and are not even evidence of what has been concealed.

7. U. S. Exhibits 30 to 53 (R. 110) were paid telephone bills which were seized on May 6, 1957. We submit that these are not the instrumentalities for committing the crime of attempting to evade the wagering tax, and they are also not "records required by law to be kept".

We request the Solicitor General to inform this court why all of the above mentioned property was subject to seizure for use in evidence to prove Petitioners' guilt.

As we have pointed out above, the only purpose for the government seizing the records of the Petitioners was to obtain evidence to prove that they had wilfully attempted to evade the payment of the tax by showing the discrepancy between the records and the amount reported to the Internal Revenue Department and upon which the tax was paid. The property seized was not illegal to possess, nor was it contraband, nor were they records used to conduct a business prohibited by Federal law. They were merely records of a business which the Petitioners conducted with full knowledge and consent of the United States. The Fifth Amendment was enacted to assure a person that they would not have to furnish incriminating testimony against himself and, if it is to be abrogated, it should be

we would think by the procedure ^{up} in the Constitution, itself.

The effect of the lower court's ruling in holding that books and records used by persons engaged in a business not prohibited by Federal law are instrumentalities for the commission of the crime of attempted tax evasion has far reaching effects beyond this case. This holding is that if an individual is indicted for an attempt to evade the payment of any tax imposed by Title 26, then all of his private papers which prove his guilt are instrumentalities for the commission of that crime. As a result of this holding, all private rights are abolished under the Fourth Amendment to papers which prove the guilt charged and every document of an individual which in any way reflects upon the liability of any tax under the Internal Revenue Code, becomes a witness against the owner in violation of the guarantees of the Fifth Amendment.

B.

Records which are usually and customarily kept and which are required to be kept by persons engaged in a taxable wagering business under the provisions of Title 26, U. S. C., Sections 4403, 4423 and 6001, and Internal Revenue Regulation 132, Section 325.32 for the purpose of determining the correct amount of wagering and income tax due are private books and records and protected by the Fourth and Fifth Amendments to the Constitution of the United States.

It is conceded by the Petitioners that they were engaged in the taxable wagering business, and that as a result they were required to keep records of the amount of profits of their business and wagers accepted by them for the purpose of determining the correct amount of income and wagering tax due to the United States under the provisions of Title 26, U. S. C., Secs. 4403, 4423, 6001, and Internal Revenue Regulation 132, Sec. 325.32.

It is also agreed by the Petitioners and the Government that the books and records of the Petitioners which were seized under authority of a search warrant on May 6, 1957, were the records of their wagering business.

The court of appeals held that the books and records which were seized were not within the protection given to private papers by the Fourth and Fifth Amendments to the Constitution of the United States, but were records required to be kept by law, and came therefore within the "required records" exception (R. 229-230).

In **Boyd v. U. S.**, 116 U. S. 623, the most important search and seizure case in the history of this court, this court held that private books and records were not subject to compulsory production to prove the guilt of their owner. This was held, even though the seizure involved "required by law to be kept."

In discussing the compulsory production of private papers this court said in the **Boyd** case:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."

The principle laid down in the **Boyd** case we believe to be controlling in the instant case, since both cases involve the compulsory seizure of the private books and records of the defendants, and which were "books required by law to be kept for inspection", and the seized papers were desired in both cases to prove that the owners thereof had

committed a fraud by attempting to evade the amount of tax owed to the United States.

Mr. Justice Frankfurter in his dissent in **Shapiro** said that the **Boyd case** speaks "loudly against the claim that merely by virtue of a record keeping provision the constitutional privilege against self incrimination becomes inoperative."

As authority for its holding, the lower court cited the following cases: **Shapiro**,¹ involving the exercise of war-time powers of the United States to regulate the price controls in the public interest; **Davis**,² involving the seizure of Government owned gasoline coupons; **Wilson**,³ involving the compulsory production of corporate records; **Smith**,⁴ which cited the **Beard case** as authority for its holding; **Beard**,⁵ upon which this court refused to grant certiorari on the representation that the Solicitor General, in opposing certiorari, argued: (1) that the constitutional question was not involved because the privilege was not claimed by the taxpayer, and (2) that he would not oppose certiorari if a case came up involving a straight declaration of refusal by the taxpayer to turn over books and records on the grounds that it was incriminating.⁶

Counsel respectfully submit that this is a case of first impression before this court, and that none of the cases cited by the lower court are authority for its holding. The principal case relied on by the Government is the **Shapiro case** which is authority for only the facts in that

¹ *Shapiro v. U. S.*, 335 U. S. 1.

² *Davis v. U. S.*, 328 U. S. 582.

³ *Wilson v. U. S.*, 221 U. S. 361.

⁴ *Smith v. U. S.*, 236 F. 2d 260 (8 Cir.), Cert. denied 352 U. S. 909.

⁵ *Beard v. U. S.*, 222 F. 2d 84 (4 Cir.), Cert. denied 350 U. S. 846.

⁶ *New York University*, 1957, *Institute on Federal Taxation*, edited by Henry Sellin, p. 1213.

case, and we say that a single decision by a closely divided court, unsupported by confirmation of time, cannot check the course of constitutional adjudication here. **Kovacs v. Cooper**, 336 U. S. 77, 69 S. Ct. 448, 454.

If this court decides that **Shapiro** is not limited to the facts in that case, and that it is authority for the proposition that all records required by law to be kept are "public records," then this court should reconsider that decision as one arising and thought to be made necessary because of the exigency of a world wide conflict. However, this court, in a 5 to 4 decision in the **Shapiro** case, made certain findings which are wholly absent here. They are discussed topically as follows:

A) **The Right to Regulate or Prohibit.** In the **Shapiro** case, this Court found that under the exercise of its war powers, Congress had a right to adopt an emergency statute to regulate and prohibit the business of the petitioner. In fact, under the emergency price control act, Congress gave the administrator the right to license businesses and provided for a means of revoking the license in the event of a violation of the act.

In the instant case, this is not true. The wagering tax was imposed by the Revenue Act of 1951 to provide extraordinary increases in revenues to meet essential national defense expenditures as a result of the military action in Korea,⁷ and it was anticipated that \$400 million would be derived annually from the tax on wagers and the occupational tax on the business of accepting wagers.⁸ Congress has no right to regulate or prohibit the wagering business, although it does have a right to tax the business and persons engaged in said business, and this Court held that the wagering act was a revenue act and was not a

⁷ *House Report No. 586*, 82nd Congress, 1st Session.

⁸ *House Report No. 586*, 82nd Congress, 1st Session, and *Senate Report No. 781*, 82nd Congress, 1st Session.

regulatory act in the *Kahriger* case.⁹ In that case, the constitutionality of the wagering act was challenged on the ground that it was an act to regulate and penalize the intrastate wagering business, and therefore, it was adopted in violation of the Tenth Amendment to the Constitution of the United States as an infringement upon the police powers reserved to the individual states. This Court rejected that argument.

In the *Shapiro* case, this Court said:

"The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of **transactions which are the appropriate subjects of governmental regulation**, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained." (Emphasis supplied.)

Thus since the information required to be recorded by the wagering act was not of **transactions which are the appropriate subjects of governmental regulation**, then the *Wilson*, *Davis* and *Shapiro* cases are not controlling.

B) The Necessity of the Record Keeping Provision. In the *Shapiro* case, the Court found that the keeping of the records required by that act was absolutely essential for the regulation of the businesses subject to the act and for the purpose of enabling the administrator to issue regulations, orders, and price schedules; that Congress meant to use the record keeping requirement to put "teeth" into the price control act; and, to enable the administrator to prevent violations.

In the instant case, since the purpose of the wagering act was to raise revenue, and not to regulate, the purpose for keeping records could only be to determine whether the correct amount of tax had been paid, and not for the

⁹ *U. S. v. Kahriger*, 345 U. S. 22.

Secretary of Treasury to issue additional regulations and orders.

For the purposes of collection of taxes there is no need to curtail any of the constitutional rights of an individual. Since the enactment of the income tax law in 1913 the Government has been successfully collecting vast sums of money under our income tax laws. It certainly does not seem necessary for the Government to have this power in order to collect taxes.

Mere convenience of law enforcement should not be sufficient to justify invasions of privacy and the chipping away of the constitutional rights of individuals. As Mr. Justice Jackson in his dissent in the **Shapiro** case, stated:

“It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to.”

Similarly, Mr. Justice Frankfurter in his dissent in the same case observed:

“While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice.”

There is no justification for doing away with the right of privacy or the constitutional privileges against self-incrimination because the case involves a collection of taxes.

(c) **The Public's Interest and Right to Inspect Records.** In the **Shapiro** case the Court found that the keeping of records was for the benefit of the public since these records indicated the price paid for the commodity by the merchant, and the price to be charged to the public for the purchase.

The records required to be kept in the instant case are a daily record showing the gross amount of all wagers on which the taxpayer is liable,¹⁰ and those which show its liability for income tax.¹¹ The public had no right to inspect these records since they were not kept for the benefit of the public. Although the statute conferred a right of inspection, it must be inferred that it was only by a Government Agent in the course of his official duties and only if the privilege under the Fifth Amendment was not asserted. These records did of necessity include information concerning the amount of income tax due the United States and they were, therefore, confidential records, and the information communicated to the Government agent was likewise confidential to such an extent that the disclosure of it by him to the public made him guilty of a misdemeanor and subject to a \$1,000 fine and a one-year imprisonment.¹² How then can it be said that they are public records, when a disclosure of this information to the public made the Internal Revenue Agent subject to imprisonment? It is clear that the records were at all times private papers.

It is conceded by the Petitioners that the Internal Revenue Department had the right to inspect their books, however, subject to their right to refuse under the Fifth Amendment. The right to inspect, however, does not include, and should not be confused with, the right to seize. As this court said in the recent case of **Abel v. U. S.**, ... U. S. ..., 80 S. Ct. 683, at page 695:

“We have held in this regard that not every item may be seized which is properly inspectable by the Government in the course of a legal search; for example, private papers desired by the government merely for use as evidence may not be seized, no matter how lawful the search which discovers them.

¹⁰ 26 U. S. C. 4403.

¹¹ 26 U. S. C. 6001.

¹² 18 U. S. C. 1905, 26 U. S. C. 7213.

Gould v. U. S., 255 U. S. 298, 310, 41 S. Ct. 261, 265, 65 L. Ed. 647."

D) The License Provision and Suspension Thereof. Under the emergency price control act, all persons who were subject to it were required to obtain a license before engaging in the business, and in the event that the licensee violated the terms of the act, this license was subject to suspension¹³ which would prevent them from engaging in that business in the future.

In the instant case, there was no attempt to license people engaged in the wagering business, and constitutionally this was prohibited by the X Amendment of the Constitution which reserved to the State the power not delegated to the federal government. The wagering act provided simply that persons who engaged in the business of accepting wagers were required to register and pay a \$50.00 occupation tax.¹⁴ In fact, the special wagering tax stamp issued by the Internal Revenue Department specifically provided that it was a stamp, and not a license (Defendants' Exs. 1 and 2). Also, since there was no license required to engage in the wagering business, the Government had no right to prohibit a person from engaging in the business.

E) Ownership of Records. The Court in the **Shapiro** case held that documents meeting the "required records" test were public documents which the defendant was required to keep, not for his private uses, but for the benefit of the public. In this case, it is conceded by the Government that the records which were seized were "partnership properties" (R. 41).

It can be clearly seen that the records required to be kept by these defendants do not take on the public aspect,

¹³ 50 U. S. C. A. App. 925 (f).

¹⁴ 26 U. S. C. 4411.

and do not meet the "required records" test as stated by this Court in the **Shapiro** case. Although the records of the Petitioners were required by law to be kept, they are still not the type that come within the "required records exception". As further emphasis, it is pointed out that this Court in the **Shapiro** case, in reviewing the record keeping requirements that were subject to compulsory production, listed twenty-five Federal Acts which they considered to be governed by the rule laid down,¹⁵ however, at no point was the Internal Revenue Code listed as being governed by the same rule.

The records which were required to be kept by the wagering act were not maintained for the purpose of providing information to the Secretary of Treasury, in order to regulate the wagering business; and, the records were not kept for any benefit to the public. Since it has been agreed by the government that the Petitioners owned these records, and by inference that they were not the mere custodians of them; none of the required standards stated by this Court were met.

Mr. Justice Frankfurter in his dissent in the **Shapiro** case advanced cogent reasons why those records were not public records and his arguments are even more compelling in this case. He said, "Certainly, records do not become public records simply because they are required to be kept by law". In his comprehensive analysis of some eleven cases, he found that in those cases where records were required to be kept by law, that they were not considered the records of any individual, but that the individual required to keep them was simply a custodian of them and that he was keeping them for the benefit and inspection of the public.

The lower court in its decision in this case has extended the doctrine laid down by this Court in the **Shapiro** case

¹⁵ See *Shapiro v. U. S.*, 335 U. S. 1, footnote 4.

to all records required to be kept by law, and states that this includes all records required to be kept by Title 26, U. S. C., Sec. 6001. (See appendix.)

Since the Secretary of the Treasury, under the provisions of Sec. 6001, may adopt regulations without consultation with anyone, he alone, under the holding of the lower court, has the absolute and unqualified authority to determine what records are "required". By so doing, his action would change private papers to public papers. By his action, he solely, or one of his subordinates, if he so desired, may limit the application of the Fourth and Fifth Amendments. The Secretary by his administrative act of classifying papers could diminish the rights granted by the Fourth and Fifth Amendments.

Mr. Justice Frankfurter in his dissent in the **Shapiro** case so succinctly stated.

"If Congress, by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers "public" and unprivileged, "there is little left to either the right of privacy or the constitutional privilege."

If it is abhorrent to think that Congress could diminish the constitutional privileges by determining certain papers to be "public", then how much more abhorrent it is to think that this power could rest with one man, the Secretary of Treasury, or his delegate, if he so chose. If the lower courts decision is the law, then indeed we have gone full circle, and once again we have the abuses which the Bill of Rights was adopted to prevent, and which the **Boyd** case stated James Otis described as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book; since they placed 'the liberty of every man in the hands of every petty officer.'"

More is at stake here than the proper choice of words. More is at stake here than whether self confessed gamblers are convicted without regard for due process. The very warp and woof of our constitutional system is being eaten away. The Fourth and Fifth Amendments are the proudest heritage of a free people. The shadow of the torture rack and the horror of the inquisition, or its modern counterpart, brainwashing, loom larger.

Again as Mr. Justice Frankfurter said in his dissent in **Davis v. U. S.**, 66 S. Ct. 1256, 1263,

“It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.”

Therefore, unless this Court sanctions the repeal of the Fourth and Fifth Amendments to the Constitution of the United States by the judicial fiat of the Court below, we believe that this Court is compelled to hold that this decision is wrong and must be reversed.

II.

Memoranda and Reports of the Government Agents Relevant to the Testimony That They Gave on Direct Examination Were Statements Within the Meaning of Title 18, Section 3500 (e) (1), as Conceded by the United States in Their Brief in Opposition to the Writ, and the Trial Court Upon Demand Should Have Ordered Their Production.

The United States has conceded in its Brief in Opposition to the Writ that government agent witnesses' statements are subject to production under Title 18, Sec. 3500

(U. S. B. O. to Writ, p. 11). This concession of the Solicitor General is not only supported by the clear language of Title 18, Sec. 3500 (a), (b), (c) and (e), but by well reasoned opinions in **U. S. v. O'Connor** (2nd Cir.), 273 F. 2d 358; **U. S. v. Prince** (3rd Cir.), 264 F. 2d 850; **U. S. v. Holmes** (4th Cir.), 271 F. 2d 635, and ironically enough in the 7th Circuit in **U. S. v. Berry**, 277 F. 2d 826, and **U. S. v. Sheer**, 278 F. 2d 65, two cases decided within three weeks after the Petition for Rehearing was denied in the instant case, and **U. S. v. Burke** (8th Cir.), 279 F. 2d 824.

The Petitioners, after the direct testimony of the government agent, Ira Minton, demanded any reports relevant to the subject matter of his testimony. Minton admitted that he prepared a report or memorandum after he returned to the office after the interview with Petitioner Kastner on May 6, 1957, and that it related to the subject matter of his testimony (R. 97-99). Government agent witness, Wilbur Buescher, after testifying for the government as to the interview with Petitioner Clancy on December 13, 1956 and as to the interview with Petitioner Donald Kastner and Defendant Prindable on December 14, 1956, also admitted that he made a report which he signed and submitted to his superior relevant to his testimony (R. 101-102). Government agent witness, Mochel, also testified that he made a report after the interviews on December 13 and 14, 1956 (R. 148). Despite the demands,¹⁶ the trial court refused to order the production holding that only statements made "contemporaneously" with the interviews were producible (R. 99-102). The trial court was obviously confusing the situation such as existed in **Palermo v. U. S.**, 360 U. S. 343, where the defense seeks to impeach a witness other than a government witness agent by the government agent's

¹⁶ The demands for the reports are found in the Record at page 97, Minton; 101, Buescher; and Mochel in the Transcript at 302-303.

report. In this case, of course, defense merely sought to impeach the government agent from a report which he admittedly made and testified was relevant to his direct testimony. The lower court in sustaining the trial court relied on three points: (1) the agents who testified were not undercover agents; (2) the order to produce is discretionary with the trial judge; (3) those agents who prepared longhand notes contemporaneously with the interviews were ordered to turn them over (R. 235).

The lower court, however, completely abandoned this criteria in its subsequent decisions in **U. S. v. Berry**, 277 F. 2d 826, and **U. S. v. Sheer**, 278 F. 2d 65 in finding that on similar sets of facts, as set out above, that they came within the purview of the statute, e. g., in the **Berry case**, supra. At page 828, the court says:

"It seems clear that the character of the report of the witness comes within the purview of the statute. Subsection (a) is found to be satisfied when the witness who made the report, 'testified on direct examination in the trial of the case.' It is admitted that the 'statement—of the witness in the possession of the United States—relates to the subject matter as to which the witness has testified,' as required in Subsection (b). It cannot be seriously doubted that the report is covered by the definition found in Subsection (c) (1) as being 'a written statement made by said witness and signed or otherwise adopted or approved by him.' "

U. S. v. Sheer, supra, could not be more similar to the case of these Petitioners. Foster, Sheer and Jackson were indicted on similar counts as were Petitioners Clancy and Kastner, and defendant Prindable, arising out of a continuation of the same city-wide raid conducted on May 6th and May 7th, 1957 by the Internal Revenue Agents in East St. Louis. **U. S. v. Sheer**, 278 F. 2d at 67. Demands were made for the reports by the defendants' at-

torneys, but the same District Judge who presided in the case at bar, the Honorable William G. Juergens, held that the defendants "will be entitled to copies of written statements made contemporaneously with the interviews" (**U. S. v. Sheer**, page 67), but denied the production of the reports. The longhand notes of all the agents were produced with the exception of one who claimed they were lost. **U. S. v. Sheer**, 278 F. 2d 66. The Court of Appeals nonetheless held that the formal reports should have been produced and that the court had no discretion in ordering the production. **U. S. v. Sheer**, supra, at page 68. The case was reversed for new trial on this single question. Certainly, there cannot be one law for one set of defendants, and another law for another set of defendants on the same identical facts.

There cannot be any serious doubt that Congress in enacting Sec. 3500 was seeking to affirm **Jencks v. U. S.**, 353 U. S. 657, and not to overrule it. In the Senate Committee Report No. 569 submitted by Mr. O'Mahoney, 85th Congress, 1st Session, this language is found:

"The committee believes that legislation would be clearly unconstitutional if it sought to restrict due process. On the contrary, the proposed legislation as reported **reaffirms** the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial.

"The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with **authenticated statements and reports of Government witnesses** which relate directly upon his testimony." (Emphasis supplied.)

These Petitioners requested no more, and were entitled to no less. They demanded the reports of the agents which

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the agents, themselves, had admitted they had made and were relevant to their testimony on direct examination. These reports were denied the Petitioners, and the denial cannot be considered harmless error.

In the application of the **Jencks Statute**, Title 18, Section 3500, the harmless error doctrine should be given little play. This court held in **Jencks v. U. S.**, 353 U. S. 657, at pages 668 and 669:

"We hold further that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

If, after the above statement of this Supreme Court, the harmless error doctrine still exists, where the Jencks Statute is involved, it certainly cannot be applied to the case of these Petitioners. These Petitioners were thwarted in their efforts to obtain the reports of Government Agents Ira Minton, Wilbur Buescher and Martin Mochel. Petitioner Clancy was defending himself against the charge of knowingly and wilfully making a false, fictitious, and fraudulent statement to Internal Revenue Agents Mochel and Buescher, and was found guilty on that charge. He was charged jointly with Petitioner Kastner and Defendant Prindable with wilfully and knowingly attempting to evade and defeat a large portion of the wagering excise tax due, and in Count V with conspiring with Petitioner Kastner and Defendant Prindable to defraud the United States in the administration of the Internal Revenue laws, and to violate the provisions of Section 1001, Title 18, U. S. C. (false statements). Subparagraphs 2, 3, 4, 5, 6 and 7 of Count IV (R. 28-29) all are based on the interviews of the agents with the Petitioners Clancy and

Kastner and Defendant Prindable and each overt act alleged in Count V (R. 31-32) of the Indictment is also based on the interviews of the agents with the Petitioners Clancy and Kastner, and the Defendant Prindable. Although Petitioner Kastner was found not guilty of making a false statement to Government agents, he was found guilty of the other two charges. Throughout the trial,¹⁷ the issue as to whether or not Kastner was actually a partner in the North Sales Company was strongly disputed (R. 107-111 and 137). Certainly, if Donald Kastner was merely a "ribbon" clerk, as described by one of the government witnesses (R. 137), or clerk, as he designated himself on the receipt taken from him by Agents Kienzler and Minton (R. 107) for the articles seized in the raid, he could not have been convicted on Counts IV and V. **Ingram v. U. S.**, 360 U. S. 545. Agent Minton testified that Kastner stated he was a "junior partner" and clerk in a partnership with Thomas Clancy and James Prindable, (T. 177) and had been a partner for three years. What Minton may have said in his report and which he may have chosen to omit or state differently on the stand, might have had a strong bearing on the jury as to whether or not the Petitioner Kastner was, in fact, a partner in the enterprise. As the Court stated in **Jencks v. U. S.**, 353 U. S. 657 at 667:

"Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

¹⁷ Up to this point we have stated the facts in the light most favorable to the government and stated as fact that Kastner was a partner. At the time of the trial, however, this was disputed.

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Wilbur Buescher's testimony (R. 100) and Martin Moehel's testimony (R. 142-143) served to convict Petitioner Thomas Clancy and Defendant Prindable on the false statement charges, but as demonstrated above, the false statement charges permeated Counts IV and V and every subparagraph thereof and served to convict all the defendants who were jointly charged in Counts IV and V.

It is evident that the demanded reports were statements within the meaning of Title 18, Section 3500, Subparagraph (e) (1), both by the Government's admission and by the clear meaning of the statute. This is not a case in which the statement erroneously withheld from these Petitioners merely duplicated information already in the possession of the defense. It is not a case in which the witness' testimony was unimportant to the proofs necessary for conviction. These reports and memoranda demanded by the Petitioners were just the type of statements which the mandatory language of Title 18, Section 3500, requires production, and the failure of the trial court and the Court of Appeals to acknowledge this fact constitutes reversible error which only this court can remedy.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below be reversed.

Respectfully submitted,

PAUL P. WALLER, JR.,

JOHN F. O'CONNELL,

214 Murphy Building,

234 Collinsville Avenue,

East St. Louis, Illinois,

Counsel for Petitioners.

O'CONNELL and WALLER,

Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 88

THOMAS D. CLANCY AND DONALD KASTNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 213-240) ¹ and concurring (R. 240) opinions of the court of appeals are reported at 276 F. 2d 617. The opinion of the district court (R. 43-55), denying, *inter alia*, the motion for return of the seized property and to suppress its use as evidence (R. 48-53), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1960 (R. 240-241). A petition for rehearing was denied on April 14, 1960 (R. 241). The petition for a writ of certiorari was filed on May 13,

¹ "R." refers to the printed record in this Court. "Tr." refers to the reporter's transcript, on file with the Clerk.

APPENDIX A.

AMENDMENTS TO THE CONSTITUTION OF UNITED STATES.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, . . .

STATUTES.

Title 18, U. S. C., Sec. 1905. Disclosure of confidential information generally.

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style or work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association; or permits

1960, and was granted on June 27, 1960 (R. 241; 363 U.S. 836). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search, pursuant to a search warrant, of premises where a horse race wagering business was being conducted, and the subsequent use of property seized during the search as evidence against petitioners in their criminal trial, were valid.

2. Whether the trial court's refusal to make available to the defense, for use in cross-examination, the reports of three government agent-witnesses was harmless error. More specifically,

a. Whether the record shows that such error was harmless with respect to agent Minton.

b. Whether, if the facts (not shown by the record) are as we understand them to be with respect to the reports of agents Buescher and Mochel, namely, that the defense received verbatim carbon copies of their reports, the error with respect to them was harmless; and whether the Court should therefore remand for a determination of these factual questions.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 56-61.

STATEMENT

On July 25, 1957 (R. 2), a five-count indictment (R. 24-32) was returned against the petitioners—Thomas Clancy and Donald Kastner—and James Prindable in the United States District Court for the Eastern

any income return or copy thereof or any book containing any abstract or particulars thereof ~~to be seen or examined~~ by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. June 25, 1948, c. 645, 62 Stat. 791.

Title 18, U. S. C., Sec. 3500 (a) (b) and (e). Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(e) The term "statement" as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) A written statement made by said witness and signed or, otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made

by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Sept. 2, 1957, Pub. L. 85-269, 71 Stat. 596.

Title 26, U. S. C., Sec. 4403. Record requirements.

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to Section 6001 (a), Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 525.

Title 26, U. S. C., Sec. 4423. Inspection of Books. Notwithstanding Section 7605 (b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 528.

Title 26, U. S. C., Sec. 6001. Notice or regulations requiring records, statements and special returns. Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulation, to make such returns, render such statements, or keep such records as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title. Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 731.

Title 26, U. S. C., Sec. 7201. Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this Title, or the payment thereof, shall in addition to other penalties provided by law, be guilty of a

District of Illinois. Count 1 (R. 24) charged petitioner Clancy with having, on or about December 13, 1956, made a false statement of a material fact to agents of the Internal Revenue Service, in violation of 18 U.S.C. 1001, namely, that the three defendants, partners doing business as the North Sales Company, had no employees or agents accepting wagers on their behalf other than Charles Kastner and Malcolm Wagstaff. Count 2 (R. 24-25) charged petitioner Kastner with having, on or about May 6, 1957, falsely stated to another agent of the Internal Revenue Service that he did not know the names of individuals accepting wagers as agents of the partnership. Count 3 (R. 25-26) charged the making of a false statement by Prindable, who is not before the Court (see fn. 2, *infra*, p. 4). Count 4 (R. 26-29) charged all three defendants with having willfully attempted to evade and defeat a large portion of the wagering excise taxes due the United States for the fiscal year ending June 30, 1957, in violation of 26 U.S.C. 4401 and 7201 (Appendix A, *infra*, pp. 56, 57-58). Count 5 (R. 29-32) charged all three defendants with having conspired, in violation of 18 U.S.C. 371, to defraud the United States in the administration of the internal revenue laws by evading and defeating a large part of their wagering excise taxes and concealing and covering up the names of agents and employees accepting wagers on their behalf.

Following a trial by jury, petitioner Clancy was found guilty on all three of the counts—1, 4 and 5—in which he was charged (R. 188). He was sentenced to four years' imprisonment on each count, to run

felony, and upon conviction thereof, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both, together with the cost of the prosecution.

Title 26, U. S. C., Sec. 7213 (a). Income returns.—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

INTERNAL REVENUE REGULATIONS.

Reg. 132, Sec. 325.32. Records.—(a) In general—(1)

Every person required to pay the excise tax imposed by section 3285 shall keep, or cause to be kept, at his office or principal place of business, or, if he has no office or principal place of business, at his residence or some other convenient office or safe location, such records as will clearly show as to each day's operation:

(A) The gross amount of all wagers accepted;

(b) Period for retaining records.—The records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the tax became due (Reg. 132, Sec. 325.32).

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 41. Search and Seizure.

“(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States Commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designated or intended for use or which is or has been used as the means of committing a criminal offense;

or

concurrently, and, on count 4, to pay a fine of \$5,000 (R. 81). Petitioner Kastner was acquitted on count 2 and convicted on counts 4 and 5 (R. 188). He was sentenced to three years' imprisonment on each of the latter counts, to run concurrently, and, on count 4, to pay a fine of \$2,000 (R. 81). In addition, each petitioner was ordered to pay one-third of the court costs (R. 81-82).¹

The Court of Appeals for the Seventh Circuit affirmed the judgments of conviction (R. 213-241).

On the tax-evasion and conspiracy counts (4 and 5), the government established that petitioners and Prindable were partners in a horse race bookmaking enterprise which did business under the name of North Sales Company (R. 84-85, 93, 100-101, 105-106, 119-122, 123-129, 139-140, 142-143, 150; G. Exs. 1-10, R. 84; G. Exs. 11-14, R. 84-85; G. Exs. 15-29, Tr. 19-22; G. Exs. 116-119, R. 150-151); that for the nine-month period from July 1956 to March 1957, inclusive, the partnership filed monthly wagering tax returns reporting the gross amounts of the wagers which it claimed had been placed with it during that period, and paid, as the wagering tax thereon,² 10 per cent of such reported gross amounts (G. Exs. 1-9, R. 84); that for the month of March 1957 the amount of wagers reported was \$11,913.50, on which the tax paid was \$1,191.35 (R. 146; G. Ex. 9, R. 84; Tr. 22-

¹ Prindable was convicted on counts 3, 4 and 5 (R. 188). He was sentenced to concurrent terms of three years on each, to pay a fine of \$2,000 on count 4, and to pay one-third of the court costs (R. 81). His conviction was affirmed by the court of appeals (R. 213-241), but he did not petition for certiorari.

² See 26 U.S.C. 4401(a) (Appendix A, *infra*, p. 56).

23); and that the true amount of the wagers placed with the partnership during that month was \$103,441.30, or more than eight times the amount reported (R. 143-146; Tr. 284-293).

On count 1—the false statement count pertaining to petitioner Clancy—the government proved that Clancy, at an interview on December 13, 1956, with Internal Revenue Agents Wilbur Buescher and Martin Mochel (who were conducting an inquiry into the wagering tax liability of the partnership) told these officers that the only agents of the partnership engaged in accepting wagers on its behalf were Charles Kastner (petitioner Kastner's brother) and Malcolm Wagstaff (R. 99-100, 142-143), whereas in fact there were numerous other persons accepting wagers on behalf of the partnership (R. 112, 114, 115, 116-117, 118, 119-122; Tr. 110-111, 136).

The facts pertaining to the two issues before the Court—the validity of the search and seizure, and the production of reports of government witnesses—are as follows:

THE SEARCH AND SEIZURE

The government's proof at the trial on the tax-evasion count consisted in substantial part of wagering slips, bet tickets, scratch sheets, and similar horse race bookmaking paraphernalia which were seized under a search warrant issued by United States District Judge William G. Juergens (R. 19-23, 87-92, 143-146). Petitioners unsuccessfully sought, on various grounds, both before and at the trial, to suppress the seized materials for use in evidence (R. 2, 36-40, 48-53).

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No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1960

THOMAS D. CLANCY AND DONALD KASTNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,

Solicitor General,

MALCOLM RICHARD WILKEY,

Assistant Attorney General,

DANIEL M. FRIEDMAN,

Assistant to the Solicitor General,

ROBERT S. ERDAHL,

PHILIP B. MONAHAN,

Attorneys,

Department of Justice, Washington 25, D.C.

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Argument:	
I. The search and seizure were valid and the seized property was properly admitted into evidence.....	28
A. There was probable cause for the issuance of the search warrant.....	28
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II. The trial court erred in refusing to order the production of the agent-witnesses' reports. But the record shows that, with respect to one of these witnesses (Minton), the error was harmless. With respect to the other two witnesses (Buescher and Mochel), we have information, not shown by the record, that the defense received verbatim carbon copies of the reports to which it was entitled.	

1. The search warrant (R. 19-21), issued May 5, 1957, covered the second floor apartment at 2300A State Street, East St. Louis, Illinois, which was above "Zittel's Tavern." The warrant directed the search of the described premises for, and the seizure if found of, "divers records, to wit, books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business", "receptacles in the nature of envelopes in which there is kept money won by patrons who have won wagers or bets made at said place of business", and "divers other tools, instruments, apparatus, United States currency and records". All of this property, the warrant stated, was used and intended for use in such business and as a means of committing criminal offenses against the United States, namely, willfully attempting to evade and defeat the payment of the special tax of \$50 per year payable by each person engaged in the business of accepting wagers, as required by 26 U.S.C. 4411 (Appendix A, *infra*, p. 56), and willfully failing to register as a person so engaged, as required by 26 U.S.C. 4412 (Appendix A, *infra*, pp. 56-57) (R. 20-21).

Probable cause for the belief that the property described was concealed on the premises and was being used illegally was based, the warrant stated (R. 20-21), on an affidavit by agent Glenwood Johnson of the Internal Revenue Service (R. 5-11) and affidavits by other officers of the Service which were referred to and incorporated by reference in Johnson's affidavit (R. 11-18). The affidavits detailed personal observa-

tions and activities of the affiants which indicated that a horse race bookmaking operation was being conducted on the premises and that the premises had not been registered for the carrying on of any wagering business. The pertinent allegations of the affidavits may be summarized as follows:

Agent Johnson stated that he had personally placed horse race bets at Zittel's Tavern with one "Heine" and the bartender, one "Murphy", on different occasions during the months of March and April 1957 (R. 7-8); that on one occasion, in March 1957, he observed a woman enter the tavern and give Heine money envelopes, a racing form and a scratch sheet, whereupon Heine walked to a doorway behind the bar which led upstairs, placed the envelopes in a stairwell area, and closed the door (R. 8); that he (Johnson), after waiting a short while following this incident, told Heine that he "had an envelope coming", whereupon Heine returned to the door, opened it, picked up an envelope, and handed it to Johnson (*ibid.*); and that the envelope had the amount "\$9.60" written on it and contained the winnings on a wager placed by Johnson on a prior occasion (*ibid.*). Johnson further stated that he had observed on the bar, under the bar, on the back bar, in the stairwell, and elsewhere in the tavern, paraphernalia commonly used in the operation of a wagering business involving the taking of bets on horse races, namely, scratch sheets, racing forms, currency, and small pads of paper approximately four by six inches in dimension (R. 10).

Agent Norman Mueller stated that on one occasion in April 1957 he observed a man, carrying a canvas sack similar to sacks furnished by banks to carry money, enter Zittel's Tavern, speak to the bartender, go behind the bar, and pass through the door leading upstairs (R. 14).

Agent Donald Yerly stated that on or about May 1, 1957, at approximately 7:09 a.m., he observed a man known to him as Charles J. Kastner, Jr., "a well known bookmaker", enter Zittel's Tavern (R. 14-15; see also R. 16); and that nine minutes later he saw a man known to him as James F. Prindable (petitioners' co-defendant), another "well known bookmaker", enter the tavern (R. 15). Agent William Ryan stated that Prindable, upon entering the tavern, went behind the bar and through the door leading upstairs (R. 17). Agent Yerly further stated that on or about May 2, 1957, he "personally examined a Special Tax Return and Application for Registry—Wagering (Form 11-C) filed by the aforesaid Charles J. Kastner, Jr., and James F. Prindable on June 29, 1957," which stated there in that their business address was 2401 Ridge Avenue, East St. Louis, Illinois" (R. 15; see also R. 17).

Agent Allan Busch stated that, according to the toll call records of the Illinois Bell Telephone Company, Collinsville, Illinois, for the period from August 1956 to January 1957, twenty-one telephone calls were made from the William Blaha Tavern in Collinsville—the headquarters of a horse race bookmaking operation in that city (see R. 18)—to "Bridge 1-0448,

* This should be "1956".

which is a telephone subscribed to by John Leppy, 2300A State Street, East St. Louis, Illinois" (R. 16).

Joseph Heckelbech, Chief of the Collections Division in the Office of the District Director of Internal Revenue at Springfield, Illinois, stated in his affidavit (R. 11-13) that he had custody of the records for that district pertaining to federal wagering taxes, including the special annual tax of \$50 payable by each person engaged in the business of accepting wagers (R. 12); that he had examined all such records covering the fiscal year ending June 30, 1957 (*ibid.*); and that there was "no record in said office for said fiscal year of a return having been filed by the operator of the place of business carried on in part in the premises known as 2300A State Street, East St. Louis, Illinois, covering John L[e]ppy, Henry D. Zittel or any other person engaged in the business of accepting wagers or engaged in receiving wagers for or on behalf of any other person in said premises or any part of said premises" (R. 12-13).

2. The search warrant was executed on May 6, 1957, by agent George Kienzler and a number of other agents, who found on the premises, and seized, a large quantity of horse race bookmaking paraphernalia (R. 88-89). Kienzler's return to the warrant listed among the articles seized scratch sheets, racing forms, turf programs, deposit tickets, a checkbook, telephone bills, approximately \$2,000 in packages of small bills, approximately \$160 in rolls of coins ranging from pennies to half-dollars, and miscellaneous notes, records, notebooks, pads, etc. (R. 22-23). Some of the information taken from the seized materials was pre-

sented to the grand jury which returned the indictment (R. 41), and some of the materials were received in evidence at the trial and constituted essential parts of the proof on the tax-evasion count.

At the time of the seizure, petitioner Kastner, who was present on the premises, was asked by Kienzler "if he had a wagering stamp or occupational tax stamp". Kastner replied that "he didn't have one personally", but that he was "a partner of the North Sales Company", of which "Thomas Clancy and James Prindable were the other partners", and that the partnership did have a stamp, which Clancy "took care of" (R. 93; Tr. 73). Kienzler did not determine at that time whether the North Sales Company had a tax stamp, but simply obeyed the command of the warrant (R. 94).

3. On August 14, 1957 (R. 2), petitioners and Prindable filed a motion for the return of the seized property and to suppress its use as evidence. They contended, *inter alia*, that the warrant was insufficient on its face; that there was no probable cause for believing the existence of the grounds on which it was issued; and that none of the property listed in the warrant was designed or intended for use, and none had been used, as means or instrumentalities for committing an offense (R. 36-37).

A supporting affidavit (R. 37-40) by petitioners and Prindable filed September 16, 1957, alleged that the property seized under the search warrant belonged to the affiants and constituted their books, records, private papers, documents and money (R. 39-40); that the affiants had been engaged in the business of

accepting wagers under the name of North Sales Company for several years prior to the fiscal year ending June 30, 1957 (R. 37); that for each such year they prepared and filed with the District Director of Internal Revenue at Springfield, Illinois, a Special Tax Return and Application for Registry—Wagering (Form 11-C) and paid the tax due thereon (*ibid.*); that on or about June 29, 1956, they similarly prepared and filed an application for registry for the fiscal year ending June 30, 1957, paid the tax due thereon, and received from the District Director, in their individual names and under the name of North Sales Company, a wagering stamp (*ibid.*); that on the application for registry last mentioned they listed as persons accepting wagers for them Charles Kastner and Malcolm Wagstaff (R. 38); that the Charles Kastner so listed was the same person as the Charles J. Kastner, Jr., referred to in the affidavit (see *supra*, p. 8) filed with the application for the search warrant (R. 38); that in their application for registry they "listed their place of business 'at large' and did in fact operate at various and numerous locations from time to time" (*ibid.*); that in December 1956 Internal Revenue Agents Martin O. Mochel and W. L. Buescher, who at that time examined the books of account of the affiants, were informed by them that they operated their business "at various and numerous locations" (*ibid.*); that this fact "was known to the District Director of Internal Revenue for several years last past," and the "information was indicated on" the application for registry which they had filed "for said years aforesaid" (R. 38-39); that they were

advised by the District Director by letter dated April 17, 1957; following the agents' examination of their books, that the examination (covering the period January 1955 to December 1956, inclusive) disclosed that no change was necessary in the tax reported for this period and that their returns for this period would be "accepted as filed" (R. 39); and that they had "never given 2401 Ridge Avenue, East St. Louis, Illinois, as the business address of North Sales Company and did not in fact conduct any business there, said address being the home of Thomas D. Clancy" (*ibid.*).

In a brief filed in support of their motion for return and to suppress, petitioners and Prindable appended, as Exhibits A, B, and C, respectively, copies of (1) their application for registry for the fiscal year ending June 30, 1957, (2) their special tax stamp for that year, and (3) the letter from the District Director, dated April 17, 1957, advising them that no change was necessary in the tax reported for the period January 1955 through December 1956. It was subsequently stipulated (R. 41-42) that these exhibits should be deemed to have been received in evidence, without objection, in support of the motion.

Exhibit A, the application for registry for the fiscal year ending June 30, 1957,^a signed by petitioner Clancy as "Partner", gave the applicant's "True name" and "trade name, if any", as "Donald Kastner, James Prindable & Thomas Clancy d/b/a North Sales Company." The "Business" address of the company was given as "2401 Ridge Ave—E. St. Louis, Ill." Immediately before this address, on the same

^a This document is the same as the government's trial exhibit 14, R. 84-85.

line, were the words "at Large", which were crossed out in pencil.* The application described petitioners and Prindable as partners in the company and gave the "Home address" of each. Clancy's home address was given as "2401 Ridge Ave—E. St. Louis, Ill."—the same address as was given for the company's business address. Item 5 on the application form asked whether the applicant was "engaged in the business of accepting wagers on your own account", and, if so, to state the "Name and address where each such business is conducted"; space for the filling in of four such locations was provided on the form. This item was answered "Yes", and in the space provided for the remainder of the information requested only the words "At Large" (undeleted in this instance) appeared. Charles Kastner was listed as one of two

* It does not appear when or under what circumstances the words "at Large" on this line were crossed out (see R. 85-87, 140-142; Tr. 23-28, 271-274). Press Waller, the accountant who prepared the application on the partnership's behalf (R. 139), testified at the trial that the words were not crossed out when he filed the application and that the application was not returned to him for correction (R. 141). Mr. Heckelbech, the chief of the Collections Division in the Springfield office of the Internal Revenue Service (R. 84), testified that a stamp might be issued to an applicant permitting him to do business "at large", or at a given address, but "not at both" (R. 86; Tr. 25, 26-27). If an application were received which was not correctly made out, Heckelbech said, the taxpayer would be asked to correct it, and no stamp would be issued until the correction was made (R. 86; Tr. 26-27). As we point out in the text (*infra*, p. 14), the stamp which was issued to North Sales Company gave the address of the company as 2401 Ridge Avenue, East St. Louis, Illinois (D. Ex. 2, Tr. 327-328). The latter address was in fact petitioner Clancy's residence address (G. Exs. 11-14, R. 84-85; R. 39).

agents of the partnership who were engaged in receiving wagers on its behalf.

Exhibit B, the special tax stamp issued to the North Sales Company for the fiscal year ending June 30, 1957, bore on its face the name and address of the taxpayer as follows:

NORTH SALES COMPANY
KASTNER DONALD—PRINDABLE JAMES—CLANCY,
THOMAS
2401 RIDGE AVE
E ST LOUIS ILL

An instruction printed on the face of the stamp read:

Upon change of ownership, control, address, or location notify your District Director immediately.

Another instruction on the stamp read:

This stamp * * * must be posted in the taxpayer's place of business. If he has no fixed place of business, he must carry the stamp on his person and exhibit it; upon request, to any officer or employee of the Internal Revenue Service. * * *

Exhibit C, the District Director's letter of April 17, 1957, was addressed to:

Mr. D. Kastner,
Mr. J. Prindable and
Mr. T. Clancy
d/b/a North Sales Co.
2401 Ridge Avenue
East St. Louis, Illinois

* This document is the same as the defendants' trial exhibit 2, Tr. 327-328.

4. On July 28, 1958 (R. 3), the district court denied the motion for return and to suppress (R. 43). The court held that the warrant was sufficient on its face (R. 49-51); that there was probable cause for its issuance (the reasonable belief that an offense, the carrying on by some one of a wagering business without having registered and paid the special tax of \$50 per year payable by each person engaged in such business, was being committed on the premises described in the warrant) (R. 51-52); and that the items seized were not "merely the private books and records of the defendants", but were "instrumentalities in conducting the illegal operations" (R. 52; see R. 53).

THE PRODUCTION OF AGENT-WITNESSES' REPORTS

1. Agent Kienzler, who, with other agents, executed the search warrant, testified that petitioner Kastner was present on the premises at the time and that he answered various questions. Kienzler testified that, in response to the question what he was doing there, Kastner "replied he was just waiting for one or more phone calls"; although Kienzler asked him "what kind of phone calls he was waiting for," Kastner "did not say" (Tr. 41-42; R. 89-90). In response to the question whether "he had a wagering stamp or occupational tax stamp," Kastner "said he, personally, did not have one but that the partnership, the North Sales Company had a stamp and that Tom Clancy took care of it" (Tr. 50; R. 93). Kienzler further testified:

A. He [Kastner] stated he was a partner in North Sales Company and that he served as a

clerk and worked on a commission of the profits; that Thomas Clancy and James Prindable were the other partners in North Sales Company; that he, himself, did not have anything to do with the records and that Tom took care of that. I asked him several times who the agents were of North Sales Company and he replied he did not know them by name so I asked him who his most frequent customers were, and again he replied he didn't know them by name but he stated a few initials which I don't recall but indicating the most recent customers. I don't recall all of them but there was a James "P" and a Mrs. "P", and others.

Q. Did he, in fact, state he didn't know the names of the agents of the North Sales Company?

A. Yes. [Tr. 51; R. 93]

Defense counsel made no request for the production of any report, memorandum, or prior statement by this witness touching upon the subject matter of his testimony; nor was the witness asked whether he had made any such report or prior statement or whether he took notes during the questioning.

Agent Ira Minton, who was present during the interview between Kienzler and Kastner, likewise testified to what Kastner said in the interview (R. 96-97; Tr. 72-74): Minton's account was as follows (Tr. 73-74):

Mr. Kienzler asked Mr. Kastner what his occupation was and Mr. Kastner stated he was a junior partner and clerk in a partnership with Tom Clancy and James Prindable. He stated he had been a partner about three years and

prior to that time, he had been a clerk or agent in their wagering activities most of his life. He was asked what his duties were and he stated he answered the telephone and took bets. He also stated that he did not collect any money. He was asked to name, or if he could name any agents and he stated he did not know any of the agents by name.* He was asked if he could name any customers and he stated he could not name them by name but he gave some initials that he knew.

At the conclusion of Minton's direct testimony, defense counsel requested, pursuant to 18 U.S.C. 3500, "the production of any statements and reports made by the witness, Ira Minton; for the purpose of inspection and to use to facilitate the cross examination of said witness, which relates to the subject matter this witness has testified to" (R. 97). The court ruled that the request would be "allowed in so far as Ira Minton wrote [anything] down contemporaneously with the making of any statement of the defendant, Kastner, to this witness", but would be denied with respect to "any report this witness, Minton, made to his superiors * * * subsequent to the conversation * * *" (*ibid.*).

During cross-examination, Minton stated that agent Kienzler took notes during the interview with Kastner, but that he himself did not take notes (R. 97; Tr. 77). Minton stated, however, that upon returning to his office he prepared a memorandum of the interview between Kienzler and Kastner in which he related his

* Kastner was acquitted on the false statement charge of count 2, to which this testimony pertained (R. 24-25, 188).

"knowledge of the conversation"" (R. 97, 99; Tr. 77, 83.) Defense counsel requested the production of this memorandum (R. 99). The request was denied, the court again ruling (*ibid.*):

If the witness made the notes contemporaneously with the giving of the statement by the defendant, Kastner, to this witness, you may have it. Any statement referred to by the witness made subsequent thereto and delivered to his superiors, you may not have.

* * * * *

We have gone over this several times. The law says made contemporaneously with and not subsequent. * * *

2. Agent Buescher testified that on December 13, 1956, approximately five months before the execution of the search warrant, he and agent Mochel interviewed petitioner Clancy in the office of Press Waller, an accountant who assisted the North Sales Company in its tax affairs (R. 99-100, 139). Buescher testified that, in reply to questions by the agents, Clancy stated: that the partners in the North Sales Company were himself, Mr. Prindable, and petitioner Kastner; that the partnership had no particular place of business; that the address, 2401 Ridge Avenue, shown on the Form 11-C ("Special Tax Return and Application for Registry—Wagering") filed by the partnership was the address of his personal residence; that during

* A copy of Minton's memorandum (omitting portions unrelated to his account of Kastner's statements) appears as Appendix B, *in/ra*, pp. 62-64. Another copy, with no deletions, has been lodged with the Clerk for examination by the Court, if it so desires.

1955 and up to June 30, 1956, North Sales had but one agent working for it, Charles Kastner; that on July 1, 1956, a new agent, named Malcolm Wagstaff, was employed; that the partnership had no agents other than those two individuals;¹⁰ that each partner and agent had a regular route which he traveled daily in the process of accepting wagers; that they did not ordinarily use the telephone to accept bets, but that "on occasions, maybe a friend of one of the partners or agents were given a number where they could be contacted by telephone to lay wagers"; that North Sales did not have a telephone; that the winning bettors were paid off by the partners; that the agents were not allowed to accept credit bets; that the partners discouraged credit betting but that certain customers were allowed to bet by credit up to \$20 or \$30; that he (Clancy) computed the winning amounts of money; and that each partner, when paying off winners, usually secured new wagers for that day at the same time (R. 100; Tr. 85-87, 88).

Buescher further testified that on the following day, December 14, 1956, he and agent Mochel conducted a joint interview of petitioner Kastner and Mr. Prindable (R. 100-101; Tr. 87-88). The agents asked them about their duties in the partnership, credit betting, their manner of accepting wagers, and whether they "laid off to other books" (R. 101). Prindable, who did "most of the answering", stated that they did not "lay off" to other bookmakers; that

¹⁰ This testimony was the basis of the false statement charge of count 1 (R. 24). See *supra*, p. 3.

they "didn't even know any other bookies in town";¹¹ that they had a route which they covered daily, most of it on foot; that no bets were taken by telephone; and that his (Prindable's) automobile expense was so small that he did not even charge it to the partnership (R. 101; Tr. 88).

On cross-examination, Buescher testified that he took no notes during these interviews, but that agent Mochel did take notes; that, based on Mochel's notes, with "everything in" which Buescher "agreed", the agents subsequently compiled an office memorandum; that he (Buescher) signed the memorandum and it was placed in Mochel's files (R. 101-102; Tr. 89-91). Defense counsel requested the production of the memorandum (R. 101; Tr. 89-90), which request was denied (R. 102).

Agent Mochel, who was present and took part in the interviews of December 13 and 14, testified to statements made by Clancy and Prindable (R. 142-143; Tr. 280-283, 303-304). At the interview of December 13, Mochel testified, Clancy stated: that the partners in the North Sales Company were himself, Mr. Prindable, and petitioner Kastner; that the partnership had no particular place of business; that his (Clancy's) residence address, 2401 Ridge Avenue, "was the address used for the wagering tax business"; that from January 1955 through June 1956 the partnership had but one agent, Charles Kastner; that, starting in July 1956, it had another agent accepting wagers for it, Malcolm Wagstaff; and that it had no

¹¹ This testimony was the basis of the false statement charge against Prindable in count 3 (R. 25-26).

agents other than these two persons (R. 142-143; Tr. 281-282).

Asked to "state * * * the substance" of the statements made by Prindable during the joint interview of Prindable and petitioner Kastner on the following day, December 14, Mochel testified that he (Mochel) (Tr. 282-283; R. 143)—

* * * asked [Prindable] his relationship he had with the deal with respect to accepting wagers and also the manner in which the wagers were paid off, whether he paid them, his own winners and he stated he did, in person. I asked him if he laid off any wagers and he stated they did not. I asked him what happened when people wanted to lay large bets with him, and he stated if the bet was too large, he just refused that bet. In the conversation, I asked him if he might recommend they call someone else to place the bet in the locality and he said he didn't even know of any other horse bookies.

On cross-examination, Mochel stated that he had prepared and signed a memorandum "as to what transpired" at the two interviews, based on "notes taken by [him] at that time" (Tr. 301-302). The following then occurred (Tr. 302-303):

MR. O'CONNELL [defense counsel]: Your Honor, we request the statement of Mr. Mochel concerning any interviews of December 13th and 14th.

THE COURT: Any long hand notes made by the witness at the time of the interview, you will turn over to the attorneys for the defendants.

(NOTE: Same produce[d] by Government Attorneys and given to defense attorneys).

Q. (Mr. O'Connell Continuing) Mr. Mochel, the first one here was with Mr. Clancy?

A. Yes, sir.

Q. Is that right, sir?

A. That is right.

Q. That was on the 13th.

A. Yes, sir.

Q. Do you have the notes taken during the interview of Prindable and Kastner which was on the 14th?

A. I think they are all there on the 14th when Mr. Prindable and Mr. Kastner were together, when they were there with Mr. Waller.

Q. Do you have those notes?

A. Yes, I believe you have the memorandum. Do you have them all?

Q. I guess you can tell me better than I. I don't know what notes you had.

A. This was with Mr. Prindable on the 14th. We talked to Mr. Clancy about their items and their method of taking bets. This had to do with that. These particular three sheets had to do with wagering of the North Sales Company.

Q. You have no notes or statement of Mr. Kastner?

A. Yes, they are in the same folder there.

MR. O'CONNELL: We request permission to inspect those, your Honor.

MR. MCKNELLY [government counsel]: Here they are.

(NOTE: Same produced and given to defense attorneys).

Q. (Mr. O'Connell Continuing) These are the only notes you took of the interview with Mr. Kastner?

A. That is right, with Mr. Donald Kastner, the defendant here.

SUMMARY OF ARGUMENT

I

The search and seizure were valid and the seized property was properly admitted into evidence.

A. There was probable cause for the issuance of the search warrant.

1. Under the statutes and regulations, "each" place where the business of accepting wagers was carried on was required to be registered.

2. The district judge who issued the warrant had probable cause to believe that 2300A State Street was a fixed place of business—if not the actual headquarters—of a day-to-day bookmaking operation which had been going on for at least several weeks and in all likelihood for a much longer period; and that whoever was conducting the business was doing so in violation of federal law because the records of the Internal Revenue Service failed to reflect that these premises had been registered. No more was necessary to the validity of a warrant authorizing the search of the premises and the seizure of the things used in committing the offense.

3. The fact that the North Sales Company, in which petitioners and defendant Prindable were partners, had paid the special \$50.00 per annum occupational tax levied on persons engaged in the business of ac-

cepting wagers, and had been issued a wagering tax stamp evidencing such payment, has no relevance to the validity of the search warrant. The warrant was not directed to *petitioners*', or the *North Sales Company's*, books and records. It was directed to specified property, located at a designated address with unknown occupants, which, there was reason to believe, was being used to operate an unregistered wagering business in violation of federal law.

B. The property was properly seized because it constituted the means of committing the offenses upon which the search warrant was based.

1. The instrumentalities of a crime—the means by which a crime is being or has been committed—are properly subject to seizure under a search warrant or as an incident to a valid arrest. The fact that the instrumentalities or means may be documentary in character is immaterial. Here, the items seized were the usual paraphernalia of a horse race book-making business, and the precise property that the warrant authorized to be seized. Since this business was reasonably believed to be operating in violation of federal law, the property was subject to seizure as the instrumentalities used in committing a federal offense.

2. Neither the fact that the North Sales Company had a tax stamp nor the further fact that petitioners were not indicted for the crime referred to in the search warrant (conducting a wagering business without having registered or paid the \$50.00 tax) supports petitioners' contention that the latter offense had not been committed at 2300A State Street. Both

the statutes and the regulations require that "each" place of business at which the business of accepting wagers is conducted be registered. While a taxpayer who has no "principal place of business" cannot meet this requirement ~~the [redacted] [redacted]~~

~~North Sales Company~~ North Sales Company was not in this category. For it plainly had a place of business—2300A State Street. Moreover, since North Sales Company's application for registry gave its business address as 2401 Ridge Avenue, the firm was violating the law by operating another place of business without also registering it.

C. The seized property was properly admitted in evidence against petitioners. Since, as we have shown, the books and records here involved were properly seized by the government, under a valid search warrant, as instrumentalities used in the commission of crime, their subsequent retention by the government, and use against petitioners as evidence, was also valid, even though the crimes which the seized property was used to prove were not the same crimes upon which the search warrant was based. *Gould v. United States*, 255 U.S. 298; *Abel v. United States*, 362 U.S. 217. Here, as in those cases, no good reason was shown for prohibiting the government from using this relevant and otherwise admissible evidence.

II

We agree with petitioners that the trial court erred in denying defense motions for the production of memoranda by agent-witnesses Minton, Buescher, and Mochel wherein they reported on certain statements

made by one or both petitioners in interviews, which statements were also the subject of the agents' testimony. Each of these memoranda was "a written statement made by said witness and signed or otherwise adopted or approved by him" within the meaning of 18 U.S.C. 3500(e)(1).

While the denial of production of these reports was error, we do not believe that this error calls for reversal of the convictions.

A. AGENT MINTON

On the record, we believe the refusal of this agent's report was harmless. The witness's testimony was not of critical significance since, with respect to the counts upon which petitioners were convicted, it was merely corroborative of other evidence.

B. AGENTS BUESCHER AND MOCHEL

These agents testified to statements made by petitioners and Prindable, concerning which the agents also reported in jointly signed memoranda. While the record does not show the fact, we have been advised by the United States Attorney that verbatim carbon copies of the agents' memoranda, signed by both agents, were delivered to the defense during the cross-examination of Mochel, the second of the two agents to testify, in addition to handwritten notes of the witness, which the court had ordered produced. If such was the fact, the error of the trial court in refusing to order the production of the memoranda was, we submit, for the reasons stated below, harmless. However, since the pertinent facts are not shown by the record as it

stands, we suggest that, unless petitioners agree with this version of the facts, the matter should be remanded for determination by the trial court whether in fact the defense did receive such verbatim copies of the agents' memoranda.

1. If the defense did receive verbatim carbon copies of the agents' memoranda, the error was clearly harmless as to Mochel, the witness then on the stand. *Rosenberg v. United States*, 360 U.S. 367, 369-370 (majority opinion), 377, footnote (dissent).

2. Nor is the situation essentially different as regards Buescher. That witness, it is true, had testified and been dismissed when (according to our information) the defense received the verbatim copies of his and Mochel's memoranda. In order for the defense to have cross-examined Buescher on the basis of the documents, it would, consequently, have been necessary to recall him. There is no indication, however, that the court would have denied such a request for recall had one been made; if anything, the record suggests that such a request would have been granted. And since the copies of the memoranda which the defense received bore the signatures of both agents, it was apparent from the face of the documents themselves that they were as germane for cross-examination purposes to Buescher as to Mochel. In those circumstances, the error as to Buescher was cured and rendered harmless.

3. The agents also prepared two other reports of statements made by petitioner Clancy during his interview with them. However, since these statements did not relate to the subject matter of the agents' tes-

timony (statements made by Clancy with respect to the wagering tax liability of the partnership), the defense was not entitled to receive them.

ARGUMENT

I

THE SEARCH AND SEIZURE WERE VALID AND THE SEIZED PROPERTY WAS PROPERLY ADMITTED INTO EVIDENCE

The search and seizure in this case were made pursuant to a search warrant issued by a United States district judge. We may put aside, therefore, all questions with respect to the scope of a search that is made without a warrant, as an incident of a lawful arrest. The issues in this case are much narrower. The questions are (1) whether there was probable cause for the issuance of the search warrant; (2) whether the property was properly seized because it constituted the means and instrumentalities of committing the offense which there was reason to believe was being committed on the premises; and (3) whether such property was properly received in evidence against petitioners in their trial for offenses other than those referred to in the search warrant. We shall show that each of these questions must be answered affirmatively.

A. THERE WAS PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT

The search warrant stated that there was probable cause to believe that specified property, "used in the conduct and carrying on" of a "wagering business" on the second floor premises at 2300A State Street, in violation of the Internal Revenue Code, was "being

concealed" on such premises (R. 20-21). This finding of "probable cause" was fully justified by the affidavits that were submitted to the district judge in support of the application for the search warrant.

1. 26 U.S.C. 4411 (Appendix A, *infra*, p. 56) imposes a special annual tax of \$50.00 upon "[e]ach person who is engaged in the business of accepting wagers" (26 U.S.C. 4401(c) (Appendix A, *infra*, p. 56)) or who "is engaged in receiving wagers" on behalf of any such person. 26 U.S.C. 4412(a)(2) (Appendix A, *infra*, pp. 56-57) makes it the duty of each person required to pay the \$50.00 special tax to register with the Internal Revenue Service

* * * *each* place of business where the activity which makes him so liable [to pay the tax] is carried on * * * [emphasis added].

The pertinent regulations (26 C.F.R. (Supp. as of January 1, 1957) § 325.50(c) (Appendix A, *infra*, p. 59)) similarly provided:

Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of *each place where such business will be conducted* * * *. [Emphasis added.]

The regulations also required that a supplemental registration Form 11-C be filed whenever there was a change in the address of any place where the wagering business was carried on (26 *id.* §§ 325.50(c), 325.57 (Appendix A, *infra*, pp. 59, 60-61)) and that the taxpayer's registered name and his "business or office address * * * if he has one" be distinctly written

or printed by the Collector on the tax stamp before it was delivered or mailed to the taxpayer (26 *id.* § 325.52(b) (Appendix A, *infra*, pp. 59-60)). And under 26 U.S.C. 6806(c) (Appendix A, *infra*, p. 57) each person liable for the special occupational tax is required to "place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person * * *" (see also 26 C.F.R. (Supp. as of January 1, 1957) § 325.53 (Appendix A, *infra*, p. 60)).

26 U.S.C. 7203 (Appendix A, *infra*, p. 58) makes criminal the willful failure of any person "required by this title or by regulations made under authority thereof to make a return * * * or supply any information * * *."

In sum, under the statutes and regulations, registration was required for "each" place where the business of accepting wagers was carried on. However, if the taxpayer had no "principal place of business," he could keep the tax stamp (reflecting the fact of registration) on his person.

2. In the instant case, the affidavits of the Internal Revenue Service agents, on the basis of which the search warrant was issued, clearly justified the inference that 2300A State Street was a fixed place of business—if not the actual headquarters—of a day-to-day bookmaking operation which had been going on for at least several weeks and in all likelihood for a much longer period (see the Statement, *supra*,

pp. 6-9).¹² The affidavit of the Chief of the Collections Division of the local Internal Revenue Service Office stated that there was no record in that office "for said fiscal year-[ending June 30, 1957] of a return having been filed by the operator of the place of business carried on in part in the premises known as 2300A State Street, East St. Louis, Illinois, covering John L[e]ppy, Henry D. Zittel or any other person engaged in the business of accepting wagers or engaged in receiving wagers for or on behalf of any other person in said premises or any part of said premises" (R. 12-13; see *supra*, p. 9).

On the basis of this information, the district judge plainly had probable cause to believe (1) that a wagering business was being conducted at 2300A State Street (*supra*, pp. 7-9), and (2) that whoever was conducting the business was doing so in violation of federal law because the records of the Internal Revenue Service failed to reflect that these premises had been registered (*supra*, p. 9). No more was

¹² According to the affidavits, observations tending to indicate that a bookmaking operation was being conducted at 2300A State Street were made on the following dates: March 20, 1957 (R. 8), another day in March 1957 (not specifically identified) (R. 7), April 12, 1957 (R. 14), April 24, 1957 (R. 7), April 29, 1957 (R. 7-8), and May 1, 1957 (R. 14-15, 16, 17-18). In addition, the fact that during the period from August 1956 to January 1957 twenty one telephone calls were known to have been made from a tavern in Collinsville, Illinois, where known bookmakers picked up horse race bets and received telephone bets, to a telephone located in the premises at 2300A State Street (R. 16, 18; *supra*, pp. 8-9) justified the inference that the bookmaking activities had in fact been going on at the State Street address for a much longer period.

necessary to the validity of the warrant authorizing the search of the premises and the seizure of the things used in committing the offense. *Jones v. United States*, 362 U.S. 257, 267-272; *Dumbra v. United States*, 268 U.S. 435, 441; cf. *Brinegar v. United States*, 338 U.S. 160, 175-176.

3. The fact that the North Sales Company, in which petitioners and Prindable were partners, had paid, for the fiscal year ending June 30, 1957, the special \$50.00 per annum occupational tax levied on persons engaged in the business of accepting wagers, and had been issued a wagering tax stamp evidencing such payment, has no relevance to the validity of the search warrant. The warrant was not directed to petitioners', or the North Sales Company's, books and records. It was directed to specified property, located at a designated address with unknown occupants, which, there was reason to believe, was being used to operate an unregistered wagering business in violation of federal law. As observed by the court below (R. 225):

It appears from the argument made by the defendants that they would have this court consider only their status as licensed gamblers, and disregard the knowledge the agents had in respect to the activities taking place at the State Street address. They assume the warrant was issued for the express purpose of seizing their books and records, for they argue that since they had registered, received a wagering stamp, and paid some wagering taxes, there was no probable cause for seizure of their books. But, as pointed out by the Government,

what defendants overlook by such argument is the fact that the warrant was not issued for the purpose of seizing *their* books. The warrant was directed to certain premises and ordered the seizure of property described therein. It did not order the seizure of defendants' property because it was not known at the time who was operating the wagering business at the address stated in the warrant. From the agents' observations there was probable cause to believe that a wagering activity was being operated in violation of the laws of the United States, especially since the premises had not been reported to the District Director as required by 26 U.S.C. § 4412 [Appendix A, *infra*, p. 56-57]. * * * [Emphasis in the original.]

It is no answer to say, as petitioners urge (Br. 5, 22-23, 28), that the North Sales Company, to the knowledge of the Internal Revenue Service, operated "at large" and that the searched premises were merely "one of the places at which [they] were conducting their wagering business that day." For it was apparent to the agents from their observations (see *supra*, pp. 6-9, 30-31, including fn. 12) that 2300A State Street was a fixed or permanent headquarters of an active bookmaking operation. As such, under the statute requiring that "each place of business" where the business of accepting wagers is carried on be registered, it was required to be registered. And it was clear from the agents' examination of the registration records that these premises had not been registered.

B. THE PROPERTY WAS PROPERLY SEIZED BECAUSE IT CONSTITUTED THE INSTRUMENTALITIES OF COMMITTING THE OFFENSES UPON WHICH THE SEARCH WARRANT WAS BASED

The search warrant stated that there was probable cause to believe that the described property was being used on the searched premises for conducting "divers criminal offenses against the laws of the United States," namely, the laws forbidding the carrying on of a wagering business without registering and paying the special \$50.00 annual occupational tax and receiving a proper federal tax stamp evidencing such payment (R. 20-21).¹³ Obviously, a necessary element of these offenses was that a wagering business was being conducted on the premises. The warrant was directed to, and authorized the seizure of, the paraphernalia used in the conduct of such business. Under settled principles, it was proper to seize the

¹³ Petitioners argue that "the crime committed by a person who engages in the wagering business without registering and paying the tax is his failure to register and to pay the tax, and not his engaging in the business without first having paid it" (Br. 33); that, consequently, "[t]he violations alleged in the search warrant [were] crimes of omission and not of commission" (Br. 33-34); and that "[i]t is difficult to understand how any property may be used as a means of committing a crime of omission" (Br. 34). The short answer to this semantic contention is that the "omission"—the failure to pay the special tax and to register—is a crime only if the taxpayer is carrying on the business of accepting wagers. In other words, the crime is the conduct of such a wagering business without having registered and paid the tax. And, as shown in the text, the seized property constituted the instrumentalities used in thus conducting the wagering business at 2300A State Street in violation of federal law. See, also, 26 U.S.C. 7262 (Appendix A, *infra*, p. 58), which makes it an offense for any person to do any act which makes him liable for the special \$50.00 tax without having paid it.

tools or instrumentalities used in committing the crime—that is, the paraphernalia used in conducting a gambling operation in violation of federal law.

1. It has long been recognized that the instrumentalities of a crime—the means by which a crime is being or has been committed—are properly subject to seizure under a search warrant or as an incident to a valid arrest. “This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.” *Harris v. United States*, 331 U.S. 145, 154; see, also, *Abel v. United States*, 362 U.S. 217, 238; *United States v. Lefkowitz*, 285 U.S. 452, 465–466; *Marron v. United States*, 275 U.S. 192, 199; *Agnello v. United States*, 269 U.S. 20, 30; *Carroll v. United States*, 267 U.S. 132, 149–150; *Gouled v. United States*, 255 U.S. 298, 309; *Boyd v. United States*, 116 U.S. 616, 623–624. See, also, Rule 41(b)(2) of the Federal Rules of Criminal Procedure, which specifically authorizes the issuance of a search warrant for the seizure of property “[d]esigned or intended for use or which is or has been used as the means of committing a criminal offense.” Moreover, the items that may be seized include not only those directly “used to carry on the criminal enterprise,”

but also those that are "so closely related to the business, [that] it is not unreasonable to consider them as used to carry it on" (*Marron v. United States, supra*).

The fact that the instrumentalities or means may be documentary in character is, as the Court has held, immaterial. "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant." *Gould v. United States, supra*, 255 U.S. at 309. See, also, *Harris v. United States, supra*, 331 U.S. at 148, 153 (canceled checks believed to have been used as means of effecting a forgery); *Marron v. United States, supra*, 275 U.S. at 198-199 (utility bills and a ledger showing liquor inventories held properly seized as instrumentalities of offense of maintaining liquor nuisance).

Here, the items seized—scratch sheets, racing forms, turf programs, deposit tickets, a checkbook, telephone bills, packaged currency, rolls of coins, and miscellaneous notes, records, notebooks, pads, etc. (R. 22-23)—were the usual paraphernalia of a horse race bookmaking business. They constituted the precise property that the warrant authorized to be seized: "divers records, to wit, books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business," "receptacles in the nature of envelopes in which there is kept

money won by patrons who have won wagers or bets made at said place of business," and "divers other tools, instruments, apparatus, United States currency and records" used and intended for use in such business (R. 20-21). Since this gambling business was reasonably believed to be operating in violation of federal law, the property used in conducting the business was subject to seizure as the instrumentalities used in committing a federal offense." Cf. *McDonald v. United States*, 385 U.S. 451, 453, 455 (numbers slips, money, adding machines; seizure held invalid on other grounds); *Merritt v. United States*, 249 F. 2d 19, 21 (C.A. 6) (lottery tickets, numbers tickets, numbers books); *Clay v. United States*, 246 F. 2d 298, 304 (C.A. 5), certiorari denied, 355 U.S. 863 ("books, records, papers, documents and memorandum relating to the business of accepting wagers * * *"); *United States v. Joseph*, 174 F. Supp. 539, 541, 544-545 (E.D. Pa.) (betting slips, "run down sheets," money, records, and other numbers game paraphernalia).¹³

2. Petitioners, pointing out that petitioner Kastner told one of the agents making the search that North

¹⁴ We do not here rely, as a ground for upholding the search and seizure, upon the ruling of the court of appeals (R. 229-230) that since petitioners were required by statute and Treasury Regulations "to keep books and records reflecting transactions carried on in the course of a taxable wagering activity", the records here seized "were not such *private* papers as to be clothed with immunity from seizure and use against the defendants under the Fourth and Fifth Amendments" (R. 229, emphasis in original). Cf. *Shapiro v. United States*, 335 U.S. 1, 17-19, 32-35.

¹⁵ See, also, *Landau v. United States Attorney for the Southern District of New York*, 82 F. 2d 285, 287 (C.A. 2), certiorari denied, 298 U.S. 665 (memorandum describing merchandise in-

Sales Company had a tax stamp (Br. 23), contend (Br. 26, 33, 38) that "the crimes alleged in the search warrant had not, in fact, been committed"; and that the seizure was therefore invalid because the seized property was not the instrumentalities of crime but the private papers of petitioners that were being taken solely for use as evidence of other offenses. However, neither the fact that the North Sales Company had a stamp nor the further fact that petitioners were not indicted for the crimes referred to in the search warrant (conducting a wagering business without having registered or paid the \$50.00 tax) supports petitioners' contention that the latter offenses were not being committed at 2300A State Street.

Both the statutes and the regulations require that "each" place of business at which the business of accepting wagers is conducted be registered. While a taxpayer who has no "principal place of business" obviously cannot meet this requirement, North Sales Company was not in this category. For it plainly had a place of business at 2300A State Street.

Moreover, North Sales Company's application for registry for the fiscal year ending June 30, 1957, gave its business address as "2401 Ridge Ave—E. St. Louis, IH." Similarly, the special tax stamp issued to the firm for that fiscal year gave the same address.

tended to be smuggled); *Foley v. United States*, 64 F. 2d 1, 4 (C.A. 5), certiorari denied, 289 U.S. 762 (liquor invoices, price lists, ledgers of customers' accounts, books of unfilled orders, etc.); *United States v. Kraus*, 270 Fed. 578, 582-583 (S.D. N.Y.) (inaccurately kept records of liquor sales and purchases legally required to be kept).

See *supra*, pp. 12, 14. The fact that the words "at large" appeared before the Ridge Avenue address on the registration application does not establish that the partnership was operating solely "at large". Indeed, both the regulations and the testimony of an Internal Revenue agent (R. 86) establish that a taxpayer having a place at which he conducts a wagering business cannot also operate "at large". In other words, since North Sales Company gave a place of business in its registration application, it was violating the law by operating another place of business without reporting that fact. It is beside the point that the business address given by the firm in its registration application, and shown in the tax stamp issued to it, may also have been the residential address of one of the partners. The same place may be both a business and a personal address.

C. THE SEIZED PROPERTY WAS PROPERLY ADMITTED IN EVIDENCE
AGAINST PETITIONERS

As we have shown, the books and records here involved were properly seized by the government, under a valid search warrant, as instrumentalities used in the commission of crime. Once it be established that the original seizure of the property was valid, its subsequent retention by the government and its use against petitioners as evidence was also valid, even though the crimes which the seized property was used to prove at the trial were not the same crimes upon which the search warrant was based. *Gould v. United States*, 255 U.S. 298; *Abel v. United States*, 362 U.S. 217.

In *Gouled*, papers were seized from the defendant's office under a search warrant which stated that there was probable cause to believe that they were used to commit the offenses of bribing an officer of the United States and conspiring to defraud the United States. Gouled was convicted of conspiring to defraud the United States and using the mails to promote a scheme to defraud the United States. The papers were received in evidence against him. This Court upheld such use of the seized papers.

In its opinion, the Court answered six certified questions. One of the questions was (p. 311):

If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon,—can such property so seized be introduced in evidence against said party when on trial for a different offence?

The Court answered the question "Yes" (p. 313), stating as follows (pp. 311-312, emphasis added):

It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out sufficient to satisfy the law and the officer having authority to issue it, and *we see no reason why property seized under a valid search warrant, when thus lawfully obtained by the Government, may not be used in*

the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law, and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence.

Similarly, in *Abel v. United States*, 362 U.S. 217, the Court recently upheld the Government's use, as evidence in a prosecution for conspiracy to commit espionage, of property that had been seized in connection with an administrative arrest preliminary to deportation. Noting that the seized objects "may well be considered as instruments or means for accomplishing his illegal status [as an alien], and thus proper objects of search" (p. 237), the Court stated (pp. 239-240):

Items (1)-(5) having come into the Government's possession through lawful searches and seizures connected with an arrest pending deportation, was the Government free to use them as evidence in a criminal prosecution to which they related? We hold that it was. Good reason must be shown for prohibiting the Government from using relevant, otherwise admissible, evidence. There is excellent reason for disallowing its use in the case of evidence,

though relevant, which is seized by the Government in violation of the Fourth Amendment to the Constitution. * * *

These considerations are here absent, since items (1)-(5) were seized as a consequence of wholly lawful conduct. That being so, we can see no rational basis for excluding these relevant items from trial: no wrongdoing police officer would thereby be indirectly condemned, for there were no such wrongdoers; the Fourth Amendment would not thereby be enforced, for no illegal search or seizure was made; the Court would be lending its aid to no lawless government action, for none occurred. * * *¹⁶

Here, too, no "[g]ood reason" has been "shown for prohibiting the Government from using [this] relevant, otherwise admissible evidence" (*Abel, supra*). It was not "seized by the Government in violation of the Fourth Amendment to the Constitution" (*ibid.*); on the contrary, as we have shown, it was "seized under a valid search warrant [and thus] lawfully obtained by the Government" (*Gouled, supra*). There is "no rational basis for excluding these relevant items from trial" (*Abel*); they may be "use[d] * * * to prove any crime against the accused as to which they constituted relevant evidence" (*Gouled*).

¹⁶ Indeed, even the dissenting opinion of Mr. Justice Brennan in *Abel* recognized that, "[i]f the search were made on a valid warrant, there would be no such issue [as to the reasonableness of the search] even if it turned up matter relevant to another crime. See *Gouled v. United States*, 255 U.S. 298, 311-312" (362 U.S. at 253).

II

THE TRIAL COURT ERRED IN REFUSING TO ORDER THE PRODUCTION OF THE AGENT-WITNESSES' REPORTS. BUT THE RECORD SHOWS THAT, WITH RESPECT TO ONE OF THESE WITNESSES (MINTON), THE ERROR WAS HARMLESS. WITH RESPECT TO THE OTHER TWO WITNESSES (BUESCHER AND MOCHEL), WE HAVE INFORMATION, NOT SHOWN BY THE RECORD, THAT THE DEFENSE RECEIVED VERBATIM CARBON COPIES OF THE REPORTS TO WHICH IT WAS ENTITLED. SINCE IN SUCH CIRCUMSTANCES THE ERROR AS TO THEM WOULD ALSO BE HARMLESS, THE CASE SHOULD BE REMANDED TO DETERMINE THE FACTS AS TO THOSE WITNESSES

Among the Government's witnesses were three Internal Revenue agents: Minton, Buescher and Mochel. Each of these witnesses testified on direct examination with respect to certain statements made by one or both of the petitioners, either to the witness or to another agent. Each witness had subsequently made a written report of the conversation or conversations in which the statements were made. The trial court denied defense motions for production of these reports, on the ground that under the Jencks Act (18 U.S.C. 3500) only contemporaneously written statements made by the agent at the time of the interview, and not subsequent reports, were producible (R. 97, 99, 101-102; Tr. 302).

We agree with petitioners that these rulings were erroneous. The Jencks Act lists two kinds of "statements" relating to "the subject matter as to which the witness has testified" that are producible upon a motion by the defense after the witness has testified on direct examination (18 U.S.C. 3500(e)): "(1) a writ-

ten statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." The trial court apparently believed that the agents' reports were covered by the definition in subsection (2). In fact, however, the definition in subsection (1) was applicable, since production was sought of "a written statement made by said witness and signed * * * by him," namely, his report covering the conversations with petitioners. The Government has recognized before this Court that statements otherwise producible under 18 U.S.C. 3500 are not immunized from production because they happen to be statements of government agent-witnesses. See Brief for the United States, pp. 26-27, *Needelman v. United States*, No. 278, Oct. Term, 1959, writ of certiorari dismissed, 362 U.S. 600."

While the denial of production of these reports was error,¹⁷ we do not believe that this error calls for reversal of the convictions. With respect to one witness,

¹⁷ In two decisions subsequent to the instant case, the court below held that reports made by government agent-witnesses to their superiors were producible. *United States v. Berry*, 277 F. 2d 826, 829-830 (C.A. 7); *United States v. Sheer*, 278 F. 2d 65, 67-68 (C.A. 7).

¹⁸ In upholding the denial of production, the court of appeals ruled that 18 U.S.C. 3500 does not apply where the agent-witness who testifies to statements made to him by an interviewed person was not an "undercover" agent but one whose identity as a government agent was known to the person concerning

agent Minton, we think the record shows that the error was harmless. With respect to the other two witnesses, the record is unclear as to precisely what material was given to the defense. While the court's rulings limited the papers to be delivered to the defense to notes made by the witnesses at the time of the interviews, according to our information the defense was actually given, in addition to such notes, verbatim carbon copies of the agent-witnesses' reports of the interviews. However, since these facts are not shown by the present record, we suggest that, unless petitioners agree with the version of the facts herein-after set forth (*infra*, pp. 49-51), this Court, without reversing the convictions and remanding for a new trial, should remand this case to the district court to determine whether the papers which were actually delivered to the defense at the trial included verbatim copies of the reports. If, upon such remand, it is found—as we believe to be the case—that petitioners were given such verbatim copies, we submit that the error in the court's order denying production of the reports was harmless. *Rosenberg v. United States*, 360 U.S. 367, 369-370 (majority opinion), 377, footnote (dissent).

A. AGENT MINTON

The Internal Revenue agents who executed the search warrant included Kienzler and Minton. Agent Kienzler, who testified first, described a conversation whose statements he testified (R. 235). There is no basis in either the language of the statute or its legislative history for such a distinction, and subsequently the court below appears to have rejected it. See note 17, *supra*.

he had with petitioner Kastner at the time of the search. According to Kienzler, Kastner told him that he was a partner in the North Sales Company; that he "served as a clerk and worked on a commission of the profits"; that Clancy and Prindable were the other partners; that he (Kastner) had nothing to do with the records of the company; that Clancy took care of those; that he (Kastner) did not personally have a wagering stamp or occupational tax stamp, but that the partnership did have such a stamp and that Clancy took care of it; that when the officers arrived he (Kastner) was "waiting for one or more phone calls," the nature of which he did not state, though he was asked to do so; that he did not know the agents of the North Sales Company by name; and that he did not know any customers of the company by name. However, Kastner mentioned the initials of a few of the most recent customers, including a "James 'P' " and a "Mrs. 'P' " (*supra*, pp. 15-16).

Defense counsel, as we have pointed out (*supra*, p. 16), made no request for the production of any report, memorandum, or prior statement by Kienzler touching upon the subject matter of his testimony; nor was he asked whether he had made any such report or prior statement or whether he took notes during the interview with Kastner.

Agent Minton testified immediately following Kienzler (R. 96). Minton testified with respect to the conversation between Kienzler and Kastner, which he "over-hear[d]" (Tr. 72), but in which he did not "personally" participate (Tr. 76). He took no notes,

but merely "observed and listened and watched Mr. Kienzler take notes" (Tr. 77). After the interview, Minton returned to his office (Tr. 77), and "prepared a memorandum" that "stated my knowledge of the conversation" (Tr. 83). It was this memorandum which the trial court refused to order produced.

According to Minton, Kastner told agent Kienzler that he was "a junior partner and clerk in a partnership with Tom Clancy and James Prindable"; that he had been a partner about three years and, prior to that time, had been a clerk or agent in their wagering activities most of his life; that he "answered the telephone and took bets"; that he "did not collect any money"; that he did not know any of the agents of the partnership by name; and that he could not name any of the partnership's customers by name, but that he knew the initials of some of them, which he gave (*supra*, pp. 16-17).

We submit that, viewed in the context of the trial and the Government's proof as a whole, the trial court's refusal to direct production of Minton's report was not prejudicial. Minton's testimony was not at all of critical significance since, with respect to the counts upon which petitioners were convicted, it was merely corroborative of a mass of other evidence.

There were two major points in Minton's testimony—(1) that Kastner admitted being a partner in the wagering enterprise, and (2) that he said he did not know any of the partnership's agents by name. The latter testimony related to the false statement charge of count 2 of the indictment (*supra*, p. 3). Since Kastner was acquitted on that count (R. 188),

this aspect of Minton's testimony is no longer of significance. The other portion of his testimony—Kastner's admission to being a partner in the enterprise—was merely cumulative of a great deal of other evidence that fully established that fact.

In the first place, Minton's testimony merely corroborated the testimony of Kienzler, who was the agent to whom the admission was made and who described his conversation with Kastner. And, as noted, petitioners made no request for any prior statements that Kienzler might have made. Kastner's admission that he was a partner was further corroborated by the testimony of agents Hudak (R. 105-106) and Mueller (R. 109). Kastner's partnership status was also established by a mass of documentary evidence, including the partnership's monthly wagering tax returns (G. Exs. 1-10, R. 84), its several applications for registry (G. Exs. 11-14, R. 84-85), the tax stamps issued to it by the Internal Revenue Service (D. Exs. 1 and 2, Tr. 327-328), and the partnership returns filed by it between 1954 and 1956 (G. Exs. 116, 118-119, Tr. 310-312). Most important of all, Kastner's own individual income tax returns from 1953 to 1956 (G. Exs. 25-28, Tr. 21-22) acknowledged that he was a partner in the enterprise and reported as income his earnings from it.

R. AGENTS BUESCHER AND MOCHEL

Agents Buescher and Mochel testified with respect to an interview they had with petitioner Clancy on December 13, 1956, and to an interview with Prindable and petitioner Kastner (jointly) on December 14,

1956—both interviews being several months before the search and seizure. See the Statement, *supra*, pp. 18-21. Buescher took no notes during these interviews, but Mochel did; on the basis of these notes, the agents subsequently prepared reports of the interviews, which both signed. See *supra*, pp. 20, 21. The trial court directed production of Mochel's handwritten notes when the latter was on the stand, but denied a defense request for production of the agents' subsequent reports. See *supra*, pp. 20-21. We agree with petitioners that under 18 U.S.C. 3500 they were entitled to production of the agents' reports. See *supra*, pp. 43-44.

Although the record shows that certain papers were turned over to defense counsel at the trial, it does not indicate precisely what those papers were (see *supra*, pp. 21-23). The United States Attorney, who participated in the trial of the case, has advised us that, in fact, the defense was given not only Mochel's handwritten notes, but verbatim carbon copies of the agents' reports as well. According to our understanding, the facts relating to the notes and reports made by these agent-witnesses of the December 13 and 14 interviews are as follows:

During the December 13 interview with petitioner Clancy, Mochel took longhand notes of statements made to the agents by Clancy. These notes we shall refer to as Mochel's "original" notes. Immediately following the interview, Mochel made a set of "secondary" notes, based on the original notes. The secondary notes were a grammatical and narrative report of

Clancy's statements at the interview, written in longhand.

The same procedure was followed by Mochel on the following day. Mochel made a set of original notes relating to Prindable and a set of original notes relating to petitioner Kastner during the agents' joint interview of those two individuals on December 14, and, immediately after the interview, Mochel made longhand secondary notes (one set with respect to Prindable and another with respect to Kastner), based on his original notes. These secondary notes, like the secondary notes relating to Clancy, were grammatical and narrative reports of what the respective interviewees said during the joint interview.

Following the making of the secondary notes, a separate "memorandum of interview" for each interviewee was typed up from such notes, with a number of carbon copies. These three typed memoranda were verbatim transcripts of the respective secondary notes and were signed by both agents. They constituted the agents' reports which agent Buescher, in his cross-examination, acknowledged signing, and which the trial court refused to make available to the defense.

During Mr. Mochel's cross-examination, carbon copies of all three memoranda, each copy bearing the handwritten signatures of both Mr. Mochel and Mr.

Buescher, were delivered to defense counsel," in addition to the witness's original notes. Thus, the defense actually received, through witness Mochel, verbatim carbon copies, signed by both agents, of the joint memoranda or reports of the agents which had been denied it when Mr. Buescher was on the stand.

We shall now show that, if the facts are as we believe them to be, the trial court's refusal to direct production of the agents' reports was harmless error. However, since these facts are not shown by the record as it now stands, we suggest that, unless petitioners acknowledge that these are the facts, the matter should be remanded for a determination by the trial court whether in fact the defense did receive verbatim copies of the agents' reports.

1. As we have pointed out (*supra*, pp. 50-51), our information is that during the cross-examination of agent Mochel (the second of the two agent witnesses), carbon copies of the agents' three reports, each copy bearing the handwritten signatures of both Mr. Mochel and Mr. Buescher, were delivered to defense counsel (Appendices C, D, and ~~E~~ *infra*, pp. 65-71). Since the defense thus received verbatim copies, signed by both agents, of the agents' reports, it follows that, at least as to Mochel, the witness then on the stand, the

* Copies of the three documents received by counsel appear as Appendices C, D, and E, *infra*. pp. 65-71.

court's error in declining to order the production of the reports was harmless. *Rosenberg v. United States*, 360 U.S. 367, 369-370 (majority opinion), 377, footnote (dissent).

2. Nor is the situation essentially different as regards Buescher. That witness, it is true, had testified and been dismissed when the defense received the verbatim copies of his and Mochel's memoranda. In order for the defense to have cross-examined Buescher on the basis of the documents thus received, it would, consequently, have been necessary to recall him for further cross-examination. There is no indication, however, that the court would have denied such a request for recall had one been made; if anything, the record suggests that such a request would have been granted.²⁰ And since the copies of the agents' memoranda which the defense eventually received bore the handwritten signatures of both agents, it was apparent from the face of the documents themselves that they were materials which were as germane for cross-examination purposes to Buescher as to Mochel. In these circumstances, we submit, the error as to Buescher was similarly cured and rendered harmless.

3. The interviews which Buescher and Mochel had with Clancy, and with Kastner and Prindable, dealt not only with North Sales Company's wagering tax liability, but also with the income of the partnership

²⁰ Thus, after agent Kienzler had been excused following his testimony, the court stated that "after the witnesses testify, they may remain in the court room." Defense counsel added: "And they can't be recalled." The court responded: "No, I didn't say that" (Tr. 70).

and the income tax liability of the individual partners. The agents' reports of their interviews with Prindable and Kastner covered both subjects. In the case of Clancy, however, the agents prepared three separate reports; one related to the wagering tax liability of North Sales Company, one to the income of the partnership, and one to the personal income tax liability of Clancy. Only the first of these three reports on the interview with Clancy was turned over to the defense (Appendix C, *infra*, pp. 65-68). The three reports are set forth in Appendices C, E, and G, *infra*, pp. 65-68, 72-73, 74, respectively.

We submit that petitioners were not entitled to the other two reports (Appendices F and G, *infra*, pp. 72-74). Under 18 U.S.C. 3500, the only report of a witness that the defense is entitled to is one "which relates to the subject matter as to which the witness has testified." The "subject matter" as to which Agents Buescher and Mochel testified was the statements made to them by Clancy with respect to the wagering tax liability of North Sales Company. They did not testify with respect to the income tax liability of Clancy himself, or the income of the partnership.

The agents' report dealing with the personal income tax liability of Clancy (Appendix G, *infra*, p. 74) does not deal with any of the matters covered in the trial testimony of agents Buescher and Mochel. Clearly, therefore, the defense was not entitled to receive this report. The report relating to the income of the partnership does contain two statements that were also made by the agents in their trial testimony: that Clancy stated in the interview (1) that the prin-

cipals in the North Sales Company partnership were himself, Prindable and Donald Kastner, and (2) that the partnership had no telephone (Appendix F, *infra*, pp. 72, 73). The making of the first statement by Clancy was testified to at the trial by both agents Buescher and Mochel (R. 100, 142-143; Tr. 85, 281); the making of the second one was testified to only by agent Buescher (Tr. 86).

However, both of these statements by Clancy were also reported in the report of the interview that was, according to our information, turned over to the defense at the trial (Appendix C, *infra*, pp. 65, 66, 68). Accordingly, any possible error in not turning over to the defense the small portions of the agents' report dealing with the partnership's income that contain these two particular statements was plainly harmless.

CONCLUSION

It is respectfully submitted that this Court should hold (1) that the search and seizure, and the government's subsequent retention of the seized property and its receipt in evidence against petitioners, were valid; and (2) that the error in denying production of agent Minton's report was harmless. It is also respectfully submitted that, unless petitioners agree with the version of the facts we have presented, the Court should vacate (but not reverse) the judgment of the court of appeals, and remand to the district court to determine whether, in the case of agents Buescher and Mochel, the papers that were actually delivered to the defense at the trial included verbatim copies of those agents' reports. We believe that this Court can now de-

termine that, if the facts are as we believe them to be, the erroneous denial of production of the agents' reports was harmless for the reasons we have set forth, but the Court may deem it more appropriate, if it adopts our suggestion for a remand, to leave it to the courts below to determine that question in the first instance.

Respectfully submitted.

J. LEE RANKIN,

Solicitor General.

MALCOLM RICHARD WILKEY,

Assistant Attorney General.

DANIEL M. FRIEDMAN,

Assistant to the Solicitor General.

ROBERT S. ERDAHL,

PHILIP R. MONAHAN,

Attorneys.

NOVEMBER 1960.

APPENDIX A

I. The relevant sections of the Internal Revenue Code (U.S.C., Title 26) provide in pertinent part as follows:

CHAPTER 35.—TAXES ON WAGERING

Subchapter A.—*Tax on Wagers*

§ 4401. *Imposition of tax.*

(a) *Wagers.*

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

* * * *

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *

* * * *

Subchapter B.—*Occupational Tax*

§ 4411. *Imposition of tax.*

There shall be imposed a special tax of \$50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any other person so liable.

§ 4412. *Registration.*

(a) *Requirement.*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

- (1) his name and place of residence;
- (2) if he is liable for tax under subchapter A, each place of business where the activity

which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) *Firm or company.*

Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

* * * * *

CHAPTER 69.—GENERAL PROVISIONS RELATING TO STAMPS

* * * * *

§ 6806. *Posting occupational tax stamps.*

* * * * *

(c) *Occupational wagering tax.*

Every person liable for special tax under section 4411 shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Treasury Department.

* * * * *

CHAPTER 75.—CRIMES, OTHER OFFENSES, AND FORFEITURES

Subchapter A.—Crimes

PART I.—GENERAL PROVISIONS

§ 7201. *Attempt to evade or defeat tax.*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty

of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

• • • • •
 § 7203. *Willful failure to file return, supply information, or pay tax.*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return [with exceptions not here pertinent], keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

• • • • •
 Subchapter B.—*Other Offenses*
 • • • • •

§ 7262. *Violation of occupational tax laws relating to wagering—failure to pay special tax.*

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000.

• • • • •
 II. The relevant sections of the internal revenue regulations (26 C.F.R. (Supp. as of January 1, 1957)) provided in pertinent part during the period here involved (March-May, 1957):

§ 325.50 *Registry, return, and payment of tax.* (a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax * * * until he has filed a return on Form 11-C and paid the special tax * * * .

(b) Each return shall show the taxpayer's full name. A person doing business under an alias, style, or trade name shall give his true name, followed by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. * * *

(c) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may accept wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such agent or employee is engaged to receive wagers * * *. As to a change of address, see § 325.57.

§ 325.52. *Tax payment evidenced by special tax stamp.* (a) Upon receipt of a return, on Form 11-C, together with remittance of the full amount of tax due, the collector will issue a special tax stamp as evidence of payment of the special tax. * * *

(b) Collectors will distinctly write or print on the stamp before it is delivered or mailed to the taxpayer the following information: (1) The taxpayer's registered name, and (2) the

business or office address of the taxpayer if he has one; if not, the residence address. * * *

§ 325.53 *Special tax stamp to be posted.* The special tax stamp issued to a taxpayer as evidence of the payment of the tax shall be kept posted conspicuously in his principal place of business, except that if he has no such place of business he shall keep such stamp on his person and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue. Any person who, through negligence, fails to post the special tax stamp in his principal place of business, or who fails to keep the special tax stamp on his person in the event he has no business address, shall be liable to a penalty of \$50 and the cost of prosecution. * * *

§ 325.57 *Change of address—(a) Procedure by taxpayer.* Whenever a taxpayer changes his business or residence address to a location other than that specified in his last special tax return (see § 325.50), he shall, within 30 days after the date of such change, register the change with the collector from whom the special tax stamp was purchased, by filing a new return, Form 11-C, designated "Supplemental Return," and setting forth the new address and the date of change. The taxpayer's special tax stamp shall accompany the supplemental return for proper notation by the collector. * * *

(b) *Procedure by collector; removal within district.* When registration is made by a taxpayer in the manner specified in paragraph (a) of this section, of a change of address within the same district, the collector, if necessary, will enter on his Record 10 (see § 325.61) the new address and the date of change. If the information disclosed on the supplemental return is such as to require a change on the face of the special tax stamp, the collector will make

the proper change and return the stamp to the taxpayer for posting.

(c) *Procedure by collector; removal to another district.* In case of removal of the taxpayer's office or principal place of business (or residence address, if he has no office or principal place of business) to another collection district, the collector will note the transfer on his Record 10, stating the change of location, and shall then transmit the special tax stamp to the collector for the district to which such business or office was removed. The latter will make an entry on his Record 10, as in the case of an original registration in his district, correct the address on the stamp, if necessary, and note also thereon his name, title, date, and district, and then forward the stamp to the taxpayer.

* * * *

APPENDIX B

May 6, 1957

[To] Frank Hudak, Group Supervisor E. St. Louis, Illinois

[From] Ira L. Minton, IRA E. St. Louis, Illinois
Memorandum of activities and observations during service of search warrant for p[re]mises located at 2300a State St. on May 6, 1957.

I arrived at the location at 10:58 A.M. and took the license numbers of the following vehicles parked in the area.

[List of license numbers follows; deleted as irrelevant to witness's testimony.]

Upon entry of the other officers I guarded the southeast corner of the building to prohibit any persons from leaving the premises until all exits were secured from the inside. At 11:05 A.M. I joined S. A. George W. Kienzler upstairs, who was beginning to question Donald Lee Kastner.

Mr. Kastner stated he was a clerk and junior partner in a partnership with James Prindable and Tom Clancy. Mr. Kastner stated they handled all bets regardless of size and made no layoffs. He stated he had been in the partnership about three years, but had been in the horse book business all his life mostly as a clerk or agent for other people. Mr. Kastner said that he could not name any agent as he didn't know any by name. In answer to inquiry Mr. Kastner said that they did not have a stamp for the location as they didn't always do business at the same location. He said Tom has been taking care of the Federal Wagering Stamp and he hasn't discussed it with Tom.

In response to an inquiry regarding who collected the money, Mr. Kastner replied that his partners and his brother Charles Kastner were the only ones to his knowledge. Mr. Kastner stated that he was given his share of the partnership by Mr. Prindable. He added that he was paid a per cent of the profits but that he doesn't know the percentage. He said he averaged \$100.00 per week. Mr. Kastner stated that he made no payouts for the partnership, kept no books on the operations, and made no inspection of the records at any time. When asked about racing service Mr. Kastner said they did not have it all the time but when they had it, it was obtained on a subscription basis from Gordon Foster. Tom takes care of it.

Mr. Kastner said his purpose on the premises was to answer the phone and to take bets. Upon request Mr. Kastner emptied his pockets. He had \$70.00 cash and other miscellaneous items of no consequence. He had no records or other betting evidence on his person. In answer to questioning he listed Jim P., Mrs. P., I. W. and V. H. as regular customers but said he didn't know their names. Mr. Kastner said that he got his scratch sheets from Charles Kastner that morning. He stated that Press Waller was their accountant and that he keep [sic] the partnership records.

The following data was transcribed from the wall paper beside the phone.

[List of telephone numbers and other notations follows; deleted as irrelevant to witness's testimony.]

After the interview I searched part of the central room in which the phone and records were located. Items listed in the inventory as #'s 1, 2, 3, 4, 12, 13, and 14 were found and immediately surrendered to S. A. Kienzler, who tagged and labeled all items. I

verified cash, inventory of items seized, and I was present when S. A. Kienzler took a statement near the close of the interview from Mr. Donald Kastner which he stated was true but did not wish to sign before consulting his lawyer. Mr. Kastner verified all cash seized and was offered an opportunity to examine [sic] all records seized. Departed the premises about 1:50 P.M.

/s/ IRA L. MINTON

APPENDIX C

12-13-56

MEMORANDUM OF INTERVIEW

North Sales Co.

M. O. Mochel and W. L. Buescher Examining Officers

Thomas D. Clancy, Partner

Examination took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, his partner, Mr. Wm. Keeley, and Mr. Clancy present.

Type of Operation

Mr. Clancy stated that the partnership operates a horsebook. Mr. Clancy was definite in answering that the partnership has not operated any other type gambling pool, specifically football, baseball.

Address

Mr. Clancy stated that the address, 2401 Ridge Ave., E. St. Louis, Ill., used on the wagering tax returns, Forms 730, is Mr. Clancy's personal residence. Mr. Clancy stated that the partnership has no principal place of business. Mr. Clancy stated that the three partners, Clancy, Prindable, and D. Kastner, pick up bets by going from place to place, where they meet their customers.

Principals

Mr. Clancy stated that the three partners, Thomas D. Clancy, James A. Prindable, and Donald Kastner, are the principals involved in accepting wagers in the name of the partnership, North Sales Company.

Agents

Mr. Clancy stated that the partnership had one employee during the period January 1, 1955, through June 30, 1956, Mr. Charles Kastner, a brother of Donald Kastner.

Mr. Clancy stated that the partnership had added another employee, Malcolm Wagstaff, during July, 1956, and presently has the two employees, Charles Kastner and Malcolm Wagstaff.

Mr. Clancy stated that the partnership has not had, and does not have any other employees.

Mr. Clancy stated that Charles Kastner and Malcolm Wagstaff accept wagers for the partnership, North Sales Company.

Manner of Receiving Bets

Mr. Clancy stated that the three principals, Clancy, Prindable, and Donald Kastner, and the two agents, Charles Kastner and Wagstaff, accept the wagers from the actual bettors. The agents accepted wagers during their terms of employment only.

Mr. Clancy stated that the three principals, Clancy, Prindable, and Donald Kastner, might occasionally accept a wager over the telephone. Mr. Clancy stated that this practice was very seldom used, but that once in a great while, a good customer or personal friend, might locate one of the principals by telephone and the principal might accept the wager. Mr. Clancy stated this situation to be very rare as none of the principals had a particular location where they might be reached.

Mr. Clancy stated he was not too familiar with the manner in which the agents, Charles Kastner and Wagstaff, accepted their wagers, as these agents are required to turn in cash for each wager accepted, and if the agents did receive wagers by telephone, then the agent is responsible for the cash involved.

Mr. Clancy stated that the principals and agents have their own bettors which they contact. Mr. Clancy stated that bettors are visited by the principals and agents to secure wagers. Mr. Clancy stated that the principals and agents make approximately the same stops and/or locations each day and therefore, the bettors have a general idea of where the principals and agents may be found in order that the bettors may place wagers.

Mr. Clancy stated that once in awhile the principals might accept wagers on credit. Mr. Clancy stated that this was very seldom as the partnership could not operate on credit. Mr. Clancy stated that a bettor was shut off if his tab reached \$20.00 or \$30.00.

Mr. Clancy stated that the limit on accepting bets was determined by the price of the horse, in other words a \$30. bet might be accepted on a short odds horse, while a \$10. bet might be refused on a long odds horse.

Manner of Paying Winners

Mr. Clancy stated that all winners were paid off by one of the three principals and the agents never pay off any winners. Mr. Clancy stated that each winner is paid off in person on the day following the placing of the wager. Mr. Clancy stated that the winners are never hard to find and that this also gives the principals a chance to accept another wager.

Race Information

Mr. Clancy stated that the partnership pays a fee of \$75.00 per week to Gordon Foster at a Distributing Company in St. Louis, Missouri. Mr. Clancy stated he was not sure of the name of the Distributing Company, but knew it was Gordon Foster.

Mr. Clancy stated that he uses a public telephone, whichever one might be handy, to call the Distributing Company and obtain the race information. Mr. Clancy stated the partnership does not have a telephone of their own.

Layoffs

Mr. Clancy stated very definitely that the partnership does not lay off any bets with other horsebooks, etc. Mr. Clancy stated very definitely that the partnership does not accept any layoff bets from any other horsebook, etc.

Records

Mr. Clancy stated that he accumulates the bet tickets from the principals and agents, marks the winning tickets with the amount won, runs an adding machine tape of the amount of wagers accepted and the amount of winners paid out, determines the amount of net profit and/or loss for the day, and then turns the bet tickets with the tape over to Mr. Press Waller, accountant.

Mr. Clancy stated that he also gave Mr. Waller the receipted bills from Pohlman News Co., for the racing forms and scratch sheets, and the Post Office Money Order receipts from payment, for race information, to Gordon Foster and/or his Distributing Company.

Mr. Clancy stated that he, personally, handled these items for the partnership. Mr. Clancy stated that the only manner in which he could identify the principal and/or agent receiving the individual wagers was through the handwriting appearing on each bet ticket. Mr. Clancy stated that a few of the bet tickets might also be in the handwriting of the person making the bet.

/s/ MARTIN O. MOCHEL

/s/ W. BUESCHER

APPENDIX D

12-14-56

MEMORANDUM OF INTERVIEW

James A. Prindable

M. O. Mochel and W. L. Buescher, Examining Officers.

Examination took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, Mr. Prindable, and Mr. Donald Kastner were present.

Mr. Prindable stated he is married and very recently had a daughter born to he and Mrs. Prindable. Mr. Prindable stated he has no income of any kind except his share from North Sales Company.

Mr. Prindable stated he has no checking account, no savings account, no stocks, no bonds, domestic or U.S. Government, no postal savings, no savings and loan, and no other accounts of any kind.

Mr. Prindable stated he covers more or less a regular route in securing wagers. Mr. Prindable stated he uses his auto in the business of securing wagers daily.

Mr. Prindable stated he takes the payoffs to his winners.

Mr. Prindable stated that he refuses any bets considered too large according to the odds on the horse. Mr. Prindable stated he actually refuses to accept bets considered too large and stated he did not recommend the bettor to any other horsebook. Mr. Prindable stated he did not know of any other horsebook.

Mr. Prindable stated that his auto expense incurred for the partnership was so small that he took care of it personally. Mr. Prindable stated he incurred no other expenses for the partnership such as telephone, etc.

/s/ MARTIN O. MOCHEL

/s/ W. BUESCHER

APPENDIX E

12-14-56

MEMORANDUM OF INTERVIEW

Donald Kastner

M. O. Mochel and W. L. Buescher Examining Officers.

Examining took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, Mr. Prindable, and Mr. Donald Kastner were present.

Mr. Kastner stated he is married and that he and/or his wife had no income during 1955 and so far in 1956, except from North Sales Co.

Mr. Kastner stated that his wife has a checking account in, either the Union National Bank of E. St. Louis, or the First National Bank of E. St. Louis. Mr. Kastner stated he was not positive which of these banks the account was in, but one or the other.

Mr. Kastner stated he has no bank account, checking or savings, no stocks or bonds of any kind, no postal savings, and no savings and loan.

Mr. Kastner stated that he used his car only to come to town and secured his wagers by walking.

Mr. Kastner stated that he pays off his own winners.

/s/ MARTIN O. MOCHEL

/s/ W. BUESCHER

APPENDIX F

12-13-56

MEMORANDUM OF INTERVIEW

North Sales Co.

M. O. Mochel and W. L. Buescher Examining Officers

Thomas D. Clancy, Partner

Examination took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, his partner, Mr. Keeley, and Mr. Clancy present.

Receipts

Totalled by Waller from bet tickets furnished by Mr. Clancy as per wagering report.

Payoffs

Totalled by Waller from bet tickets furnished by Mr. Clancy as per wagering report.

Expenses

The amount of wagering tax is computed from the records kept by Waller who also prepares the wagering tax return for Mr. Clancy's signature.

Mr. Clancy stated the partnership purchases one wagering stamp to cover the three principals, Clancy, Prindable, and Donald Kastner. Mr. Clancy stated that the partnership has always paid for the wagering tax stamp for the employees, Charles Kastner and Wagstaff.

Mr. Clancy stated that he kept a weekly record of wages paid by the partnership and reported the totals

to Mr. Waller each quarter in order that the employment tax returns might be prepared.

Mr. Waller computed the employer's share of the F.I.C.A. tax as 2% of the wages reported for F.I.C.A.

Mr. Clancy stated that the amount deducted as telephone expense was actually expended for race information which was secured over the telephone, Mr. Clancy stated that the partnership had no telephone.

Mr. Clancy stated that the amount deducted for forms was the expense incurred for form sheets and scratch sheets to Pohlman News Co. Mr. Clancy and Mr. Waller stated that the accounting fee is \$50. per month to Mr. Waller.

Mr. Clancy stated the partnership had no other expenses, such as books, auto, entertainment, and/or office supplies. Mr. Clancy stated that if any of these items were incurred, they were very insignificant, and each partner would merely pay the expense without bothering to deduct it.

Other Information

Mr. Clancy stated the partnership has a checking account in the Southern Illinois National Bank, E. St. Louis, Illinois. Mr. Clancy stated the partnership has no other bank accounts such as a savings account. Mr. Clancy stated the only reason for this checking account was to be able to send checks for the wagering tax.

Mr. Clancy stated the partnership has never made any payoffs to any city, county, and/or state officials.

Records are substantially as disclosed in report on wagering tax.

/s/ MARTIN O. MOCHEL

/s/ W. BUESCHER

APPENDIX G

12-13-56

MEMORANDUM OF INTERVIEW

Thomas D. Clancy

M. O. Mochel and W. L. Buescher Examining Officers

Examination took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, his partner, Mr. Keeley, and Mr. Clancy were present.

Mr. Clancy stated he is a partner in the Ship's Bell, a tavern, E. St. Louis, Illinois. Mr. Clancy definitely stated he did not accept horse bets in the Ship's Bell Tavern. Mr. Clancy stated he does not work in the Ship's Bell Tavern, and is interested in it only that he might have something to fall back on.

Mr. Clancy stated he has a personal checking account and a personal savings account in the Southern Illinois National Bank, E. St. Louis, Illinois. Mr. Clancy stated he has stock in Associated Funds, an investment house, and bonds from the E. St. Louis and Interurban Water Co. Mr. Clancy stated he has no U.S. Government bonds, no postal savings, and no other accounts of any kind.

Mr. Clancy stated that his income from the above items and from North Sales Co., are his only sources of income.

Mr. Clancy stated that he, personally, had no expense in connection with the North Sales Co., such as, telephone expense or expense with respect to any other horsebook.

/s/ MARTIN O. MOCHEL

/s/ W. BUESCHER

FILE COPY

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 88.

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS.

PAUL P. WALLER, JR.,
JOHN F. O'CONNELL,
244 Murphy Building,
234 Collinsville Avenue,
East St. Louis, Illinois,
Counsel for Petitioners.

O'CONNELL & WALLER,
Of Counsel.

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REPLY BRIEF FOR PETITIONERS.

STATEMENT.

We, the Petitioners' attorneys, categorically deny the statements in the Brief of the Respondent that we received signed, verbatim, carbon copies of the joint report of Agents Mochel and Buescher.¹ So seriously do we view this complete misrepresentation of the facts that we have filed our Affidavits with the Clerk (Appendix infra pp. 14-16) unequivocally denying that we received any of these reports contained in the Government's Appendix.

¹ U. S. Brief, pp. 49, 50 and 51, Footnote 19; Appendix C, pp. 65-68.

ARGUMENT.

The Government in its Brief has changed its position so completely that we feel as did Justice Jackson in the Orloff Case² that they are not arguing the questions presented, but "nimbly dancing a quadrille". The Government has completely abandoned the holding of the District Court and the Court of Appeals in justifying the seizure of the books and records as instrumentalities of the attempt to evade the 10% wagering tax and Court of Appeals Classification as within the "required records" exception.

The Government has further shifted its position and now contends for the first time that Petitioners failed to register "each" place at which they did business, and, therefore, the private books and records used to conduct their wagering business constituted the instrumentalities for operating a business in violation of Federal law, a crime not alleged in either the search warrant or the Indictment. The Government has now injected a completely new theory into this case, which practice was criticized by this court in **Giordenello v. U. S.**, 357 U. S. 480.

We feel that we must apologize for the length of this Brief but in order to successfully meet the new theories of the Government it is necessary for us to argue at greater length.

I. The Search and Seizure.

A-1. Although the Government does not deny the fact that Petitioners did prepare and file their Application for Registry-Wagering (Form 11-C) (U. S. Ex. 14, R. 84) and paid the \$50.00 special tax, they now contend that Petitioners by answering Question 5a on Form 11-C, (See Appendix p. 13) with the words "at large", that this con-

² Orloff v. Willoughby, 345 U. S. 83.

stituted a failure to register. For four consecutive years, the Petitioners filed their "at large" registrations (U. S. Ex. 11-14; R. 84), were issued wagering stamps (Def. Ex. 1 and 2, R. 142), and were never directed by the District Director of Internal Revenue to cease or desist from this practice.

Government Agent-witness Joseph Heckelbeck, head of the Collection Division, testified, "To my knowledge, there is nothing wrong in operating 'at large'" (R. 86); and further, "The application for the special stamp must be in order by the statute before we can issue it" (R. 86). Government Witness Press Waller, who prepared the applications in behalf of Petitioners, also testified: "Q. What does that 'at large' mean?" "A. They can do business anywhere". "Q. That was the purpose of inserting that?" "A. Yes, sir" (R. 41).

At the time the Petitioners filed their registration (Form 11-C), they listed their business address as "At Large—2401 Ridge Avenue, East St. Louis, Illinois", the residence of Clancy as indicated on all four of the registrations (Form 11-C) previously filed by them (U. S. Ex. 11-14; R. 84). The precise time at which the words "At Large" before the address, were crossed out in the registration for 1956-1957 is not known to the Petitioners.³ However, they do know that it was not crossed out when it was filed by their accountant, and it was not returned for correction (R. 141). Since this application was in the hands of Government agents at all times subsequent to being filed, it must have been done by one of them. No attempt was made by the Government agents to also alter the information supplied in Paragraph 5a; that Petitioners operated their business "at large".

³ The same type of alteration was made on an Application for Registry-Wagering filed with the same District Director of Internal Revenue and introduced in evidence in the case of *U. S. v. Sheer, Foster and Jackson*, 278 F. 2d 65, which was tried one week later in the same District Court in which this case was tried.

The record is clear that the Petitioners did operate "at large." ^A2300a State Street was not a permanent place of business. Government witness Henry Zittel testified that his father lived upstairs above his tavern at 2300a State Street, and that the Petitioners were in and out of there after he took over the tavern on January 1, 1954 (R. 122). Government witnesses Burns and Lampe testified that their telephones were used sometimes by Mr. Prindable to accept wagers (Appellee's App. pp. 25-26). Government Witness Manning testified that his telephone bills were paid by James Prindable (one of the partners of the North Sales Company), and that it was Mr. Prindable's idea to have the telephone installed (Appellee's App. pp. 27-28). Government Agent-witnesses Mochel and Buescher both testified that on December 13, 1956, Clancy told them there was no particular place of business although his residence at 2401 Ridge Avenue was the address used for the wagering tax business (R. 100 and 142).

Once the Application for Registration is filed and accepted, the requirements of the statute are met, except that a taxpayer is required to file a supplemental return if he obtains new agents (Int. Rev. Reg. 325.50 (c)) or changes his business or residence address to a location other than that specified in his last Special Tax Return (Int. Rev. Reg. 325.57 (a)). Since Petitioners had no principal place of business, using Clancy's residence address and this not being changed, there was no obligation for them to file a supplemental registration. Although the language of the above regulation (325.57 (a)) does not say the address of his "principal" place of business, neither does it say "each" place of business. "Business address" is used in the disjunctive with "residence address", and since this requirement is contained in the regulation (325.57) dealing with a change of address for the purpose of determining in what collection district a taxpayer registers and pays his

tax, it must mean "principal place of business". The reason being that where a person registers and pays his tax is determined by the location of his principal place of business or his residence if he has no principal place of business (Int. Rev. Reg. 335.50 (a)).

Certainly, the government after having issued stamps on Petitioners' "at large" registration for four years without once indicating to the Petitioners that this was not an acceptable registration, cannot now say, at this late stage, that the filing of an "at large" application exposed these Petitioners to being charged with **wilfully** having failed to register. "At large" can have only one meaning, that they operated at no definite permanent place.

A-2. All of the known facts must be presented to the District Judge before he can make an independent judgment of probable cause. We say Internal Revenue Agents Yerly and Edwards acted in bad faith when they withheld from the issuing Judge after examining the Registrations (Form 11-C) of Charles J. Kastner (R. 16-17) and James Prindable (R. 14-15) that Prindable was a partner in the North Sales Company; that it was clearly stated in his Registration (Form 11-C) (App. 13) that the North Sales Company operated "at large" in answer to Question 5a; that Charles Kastner was listed as an agent accepting wagers in behalf of the North Sales Company; and that the O. K. marked in front of Charles Kastner's name on the North Sales Registration (Form 11-C) (U. S. Ex. 14) indicated that the records had been examined to determine that Charles Kastner had a wagering stamp. If the Court had been informed that Prindable, a partner in the North Sales Company, registered under an "at large" registration (Form 11-C) and that Charles Kastner was listed as an agent on the same registration, the immediate reaction as a "reasonably prudent man" should have been that this was one of the places where North Sales Co. was

operating "at large" that day, or in the alternative that Petitioner had established a principal place of business and were not yet required to file a supplemental registration because 30 days had not yet elapsed (Int. Rev. Reg. 325.57 (a) App. 18).

A-3. The Government next contends that there was probable cause even though the North Sales Company had filed its Application for Registry-Wagering, and paid the \$50 tax, since the warrant was directed to specified property located at a designated address and not to Petitioners or North Sales Co.³ There is no substance to this argument for two obvious reasons: First, as demonstrated in the preceding paragraphs, the Internal Revenue Agents knew, without question, that Prindable and Charles Kastner, whose activities they observed at 2300a State Street, were partner and agent respectively of North Sales Co., which was issued a wagering stamp pursuant to an "at large" registration. Secondly, even though the agents may have sincerely believed that there was probable cause, when it was proved at the hearing on the Motion to Return the Property filed pursuant to Rule 41 (c)⁴ by an uncontroverted affidavit and stipulation that 2300a State Street was merely one of the places at which Petitioners were operating their wagering business on the day of the unlawful seizure of Petitioners' private books and records, the property should have been ordered returned by the court.

The Government's own witness, Press Waller,⁵ testified that a taxpayer registered under an "at large" registration could do business anywhere (R. 141). A wagering

⁴ Federal Rules of Criminal Procedure.

⁵ A former Division Chief of the Internal Revenue Department with 17 years experience and a former supervisor of 27 counties in Southern Illinois.

stamp is issued to the **taxpayer**, and not to each **place** at which the wagering business is conducted (26 U. S. C. 4903). Since the Government recognized and accepted "at large" registrations, it certainly should not come as a surprise to the Government that persons so registered would conduct business at an address not included in their registration (Form 11-C).

B-1. The search warrant authorized the seizure of certain property which "have been and are now being used" as a **means of committing** the crimes of (1) wilfully attempting to evade a tax, to-wit: the special tax of \$50 per year; and (2) wilfully failing to prepare and file (Form 11-C). Therefore, the search warrant authorized the seizure **only of the means or instrumentalities by which the crimes alleged in the search warrant had been or were being committed**. Since the crimes alleged in the search warrant had, in fact, not been committed, then it follows that there could be no instrumentalities for committing these crimes, and accordingly, no items were subject to seizure under authority of that warrant unless they had been so used.

The Government has completely rephrased the search warrant for its own purposes, and alleges that it charges, in effect, the crime of carrying on the wagering business without having registered. There is no federal prohibition in the **statutes** against carrying on wagering businesses **without having first registered**. The prohibition is against carrying on the business until the tax has been paid (26 U. S. C. 4901).

Furthermore, the Government is attempting to justify the seizure in this case on grounds totally different from those determined in the search warrant (R. 52). Wilfully failing to file the application for registration is a totally different offense than **wilfully** failing to supply some of the

information requested in said form, which is a separate crime.⁶

"Rule 41 is a codification of pre-existing statutory and case law relating to searches and seizures".⁷ Under the existing law at the time Rule 41 was adopted (Old 18 U. S. C. Sec. 612 (2)), a search warrant could be issued to seize only property which was being used to commit a felony. Even taking the Government's position as being true—which we deny—the wilful failure to supply all of the information requested in the registration, or even wilfully failing to file the registration (Form 11-C) itself, would only make the Petitioners guilty of violating 26 U. S. C. Sec. 7203 (Government App. p. 58), a misdemeanor. Therefore, under Old 18 U. S. C. Sec. 612 (2), a search warrant would not issue to seize those instrumentalities used as a means of committing either of these misdemeanors.

The Government's contention is that the Petitioners' private books and records used to conduct their wagering business are the means for carrying on a criminal enterprise because it is alleged that they failed to supply all of the information required in their application for registration. If this is true, then if a merchant fails to supply all of the information required of him in his income tax return, he then is operating a criminal enterprise, and, all of his books and records would be the means for carrying on a criminal enterprise and subject to seizure.

The question of "reasonable belief" or "probable cause" goes to the question of the proper issuance of the warrant, but does not justify the seizure thereof. Just as

⁶ *Pappas v. U. S.*, 216 F. 2d 515, 10 Cir.

⁷ *Barren and Holtzhoff, Federal Practice & Procedure*, Vol. 4, p. 348; See also Notes of Advisory Committee on Rules, Rule 41, Federal Rules of Criminal Procedure.

this court said in **Henry v. U. S.**, 80 S. Ct. 168, "If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. **Carroll v. U. S.**, 267 U. S. 132, 156; 45 S. Ct. 280, 286; 69 L. Ed. 543." Thus, the question of probable cause or the reasonable belief of the agents is viewed for the purpose of determining whether or not they acted with or without authority, and whether they had a right to **inspect** the property. However, if the property seized is not an instrumentality for the commission of the crimes alleged in the search warrant, or if, in fact, the crime had not been committed, the property must be returned.

B-2. Has already been answered above.

C-1. The government has completely abandoned the holding of the Court of Appeals that Petitioners' books and records were instrumentalities of the attempt to evade the 10% wagering tax or that they were within the "required records" exception. However, the Government argues that since the original seizure was valid—which we deny—that the subsequent retention of the property and its use in evidence against Petitioners was also valid. In support of this proposition they cite the *Goulds*⁸ and *Abel*⁹ cases, neither of which are authority for this proposition.

The *Goulds* case was reversed by this court because the seized papers were obtained by unlawful searches and seizures. All other language was dicta. In the *Abel* case, although this court upheld the admission of the property seized in a prosecution for a different crime, it was careful to point out that the articles were also instrumentalities for the commission of the crime of espionage, which the property was introduced to prove.

⁸ *Goulds v. U. S.*, 255 U. S. 208.

⁹ *Abel v. U. S.*, 362 U. S. 217.

Thus, since the private books and records were not instrumentalities for the crimes alleged in the search warrant or crimes for which Petitioners were indicted, their admission in evidence constituted a violation of their rights under the V Amendment.

II. Production of Agent-Witnesses' Reports.

The United States Attorney, who is purported to have stated that we received signed, verbatim copies of Agent witnesses' Mochel and Buescher's reports, did not participate in the trial of the case, and was seldom in the Court room during the course of the trial.

The "assistant" United States Attorney, Mr. Robert McKnelly,¹⁰ who tried this case for the Government confirms our statements that we never received the reports of the agents as set out in the Appendix to the Government Brief.

The Government has always heretofore stoutly maintained that we received the **longhand notes written contemporaneously with the interview** and these, under the law, were all to which we were entitled. When the Government filed its Answer to our Petition for Rehearing in the Court of Appeals stated (p. 6) "In any event, in the instant case plaintiff, upon demand by defendants, made available the agents' **longhand notes taken at the time of the interview** (R. 396), which were the basis for the **subsequently** prepared investigative reports (R. 195, Def. App. 102)" (Emphasis supplied).

The Solicitor General in his Brief in opposition to our Petition for Writ of Certiorari at page 11 said, "In any event, we believe that, in the circumstances of this case,

¹⁰ Whose present address is Barrister Building, 107 North Elm Street, Champaign, Illinois, Telephone Fleetwood 2-7676.

the trial court's refusal to command the production of Agent Witnesses' formal reports constituted harmless error. Following the direct testimony of Agents Hudak, Mueller and Mochel, **longhand notes of the interviews with the defendants, which were prepared contemporaneously with the interviews**, and constituted the basis of the later prepared reports, were turned over to defense counsel for inspection" (Emphasis supplied). And on page 12 of the same Brief, the Solicitor General argued, "Petitioners, in short, received the 'work product' **from which the reports denied them were compiled, transcribed at the exact time the interviews occurred**" (Emphasis supplied.

It is difficult to believe that if the Government had delivered these signed verbatim copies of the reports contrary to the ruling of the trial judge, that they would suggest it here for the first time, and that the Asst. U. S. Attorney who tried this case would not have raised it previously.

The Solicitor General is completely departing from the law governing appeals when he goes completely outside the record to attempt to impeach the record by a statement that cannot even be considered as evidence, but we deem this so serious that we refuse to hide behind these established principles and prefer to meet the Solicitor General headon by our Affidavits.

The Government has conceded that there can be no questioning about the reversible error committed in refusing Agents Buescher and Mochel's signed statements. As to Agent Minton's report, we submit that the Government cannot dictate the defendants' strategy of trying a lawsuit, and because we did not request Agent Kienzler's report in no way made the refusal of the court to allow us to have Agent Minton's report harmless error.

CONCLUSION.

We respectfully request, for the reasons above stated, that the judgments of both lower courts be reversed; that this case be remanded to the district court with instructions to the trial judge to allow Petitioners' Motion for Return of Property and to Suppress Evidence, and to also order the return of all copies, schedules and other information obtained from said papers.

All of which is respectfully submitted.

PAUL P. WALLER, JR.,

JOHN F. O'CONNELL,

214 Murphy Building,

234 Collinsville Avenue,

East St. Louis, Illinois,

Counsel for Petitioners.

O'CONNELL & WALLER,

Of Counsel.

APPENDIX.

FORM 11-6
Rev. Jan. 1955

U. S. Treasury Department—Internal Revenue Service
SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for date and place for filing return)

Return for period from July 1st, 1956 to June 30, 19 57
(Month, day, and year)

1. Name: True name Donald Kastner, James Prindable & Thomas Clancy a/h/a

Alias, style, or trade name, if any North Sales Company

2. Address: Residence

Business at large - 2401 Ridge Ave-E. St. Louis, Ill.

3. If this is merely an application for registry with which no remittance of tax is required, please explain and give your Special Tax Stamp No. and Reason for No. (see instruction 2)

JOURNALIZED
JUL 12 1956

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)
4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address
<u>Donald Kastner</u>	<u>Partner</u>	<u>1510 N. 49th St-E. St. Louis, Ill.</u>
<u>James Prindable</u>	<u>Partner</u>	<u>1741 Belmont-E. St. Louis, Ill.</u>
<u>Thomas Clancy</u>	<u>Partner</u>	<u>2409 Ridge Ave-E. St. Louis, Ill.</u>

5. Are you engaged in the business of accepting wagers on your own account? ☒ Yes ☐ No
(Check one)
If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is conducted

Name of location
At Large

37 JUN 29 1956
DIV. INV. REV.
SPRINGFIELD, ILL.

(b) Number of employees and/or agents engaged in receiving wagers on your behalf 2

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State
<u>Michael H. Wagstaff</u>	<u>None</u>	<u>2401 Ridge Ave.,</u>	<u>E. St. Louis, Ill</u>
<u>Charles Kastner</u>		<u>1112 Summit Ave-E. St. Louis, Ill</u>	

6. Do you receive wagers for or on behalf of some other person or persons? ☒ Yes ☐ No
(Check one)
If yes, give true name and address of each such person.

True name	Street address	City and State
<u>North Sales Co-</u>	<u>2401 Ridge Ave-</u>	<u>E. St. Louis, Ill.</u>

For District Director's Use Only

(Stamp number)

(Date issued)

(Registration number)

Tax \$
Penalty \$
Total \$

Make remittance payable to "District Director, I.R.S." Payment may be made by cash, check, or money order.

State of Illinois,
County of St. Clair.

AFFIDAVIT.

I, Paul P. Waller, Jr., being first duly sworn, depose and state upon my oath that I am a member of the Bar of the State of Illinois and have been for 10 years last past; that I am a member of the Bar of the State of Missouri; that I am a member of the Bar of the Supreme Court of the United States; that I maintain offices for the practice of law at 214 Murphy Building, 234 Collinsville Avenue, East St. Louis, Illinois; that I was one of the attorneys, John F. O'Connell being the other attorney, who represented the Petitioners Thomas D. Clancy and Donald Kastner during the trial of the case in the United States District Court for the Eastern District of Illinois, styled United States of America v. Thomas D. Clancy, James F. Prindable, and Donald Kastner, Criminal No. 18,831, commencing on the 11th day of May, 1959, and concluding on the 14th day of May, 1959; that pursuant to Title 18, U. S. C., Section 3500, a demand was made for the reports of Government Agents Wilbur Buescher and Martin O. Mochel, but the court refused said demand and permitted only the longhand notes made contemporaneously with the interview to be produced; that longhand notes of these Agent-witnesses were the only papers produced for this attorney's inspection; and that the memoranda of interviews contained in the Solicitor General's Brief on pages 42-74, Appendix B, C, D, E, F and G were never produced for inspection by this attorney, nor were they ever seen by this attorney until what purports to be copies of them appeared in the Solicitor General's Brief.

Dated this 2nd day of January, 1961.

Paul P. Waller, Jr.

~~Subscribed and sworn to before me this 2nd day of~~
January, 1961.

(Seal)

Wanda Jean Cowell,
Notary Public.

My commission expires: January 14, 1961

State of Illinois,
County of St. Clair.

AFFIDAVIT.

I, John F. O'Connell, being first duly sworn, depose and state upon my oath that I am a member of the Bar of the State of Illinois and have been for 13 years last past, and that I maintain offices for the practice of law at 214 Murphy Building, 234 Collinsville Avenue, East St. Louis, Illinois; that I was one of the attorneys, Paul P. Waller, Jr., being the other attorney, representing the Petitioners Thomas D. Clancy and Donald Kastner during the trial of the case in the United States District Court for the Eastern District of Illinois, being styled United States of America, Plaintiff, vs. Thomas D. Clancy, James A. Prindle and Donald Kastner, Criminal No. 18,831, commencing on the 11th day of May, 1959, and concluding on the 14th day of May, 1959; that pursuant to Title 18, U. S. C., Section 3500, a demand was made for the reports of Agent-witnesses Wilbur Buescher and Martin O. Mochel, but the court refused said demand and permitted only the long-hand notes made contemporaneously with the interview to be produced. These longhand notes were the only papers of these Agent-witnesses produced for this attorney's inspection and the memoranda of interviews listed in the Solicitor General's Brief on page 62, Appendix B, C, D, E, F and G were never produced for inspection by this attorney, nor were they ever seen by this attorney until what

purports to be copies of them appeared in the Solicitor General's Brief.

Dated this 2nd day of January, 1961.

John F. O'Connell.

Subscribed and sworn to before me this 2nd day of January, 1961.

(Seal)

Wanda Jean Cowell,
Notary Public.

My commission expires: January 14, 1961.

Federal Rules of Criminal Procedure, Rule 41, Search and Seizure.

"(c) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion.

but the court in its discretion may entertain the motion at the trial or hearing.

Title 18, Section 612, Grounds for Issue.

"A search warrant may be issued under this Chapter upon either of the following grounds:

"2. **When the property was used as the means of committing a felony**; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be" (Emphasis supplied).

Title 26, Section 4901, Payment of Tax.

"(a) Condition Precedent to Carrying on Certain Business—No person shall be engaged in or carry on any trade or business **subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor**" (Emphasis supplied).

Title 26, Section 4903, Liability in Case of Business in More Than One Location.

"The payment of the special tax imposed, **other than the tax imposed by section 4411**, shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the register kept in the office of the official in charge of the internal revenue district . . ." (Emphasis supplied).

Internal Revenue Regulations 325.50.

"§ 325.50. Registry, return and payment of tax (a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax imposed by section

3285 of the Internal Revenue Code (see § 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code. Filing of successive applications and payment of tax by such persons are required on or before July 1 of each year thereafter during which taxable activity continues. **The return, with remittance, shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States, but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Maryland. The collector, upon request, will furnish the taxpayer proper forms which shall be filled out and signed as indicated therein"** (Emphasis supplied).

Internal Revenue Regulations 325.57.

§ 325.57 Change of address—(a) Procedure by taxpayer. Whenever a taxpayer changes his business or residence address to a location other than that specified in his last special tax return (see § 325.50) he shall, **within 30 days after the date of such change**, register the change with the collector from whom the special tax stamp was purchased, by filing a new return, Form 11-C, designated 'Supplemental Return', and setting forth the new address and the date of change. The taxpayer's special tax stamp shall accompany the supplemental return for proper notation by the collector. As to liability in case of failure to register a change of address within 30 days, see § 325.58" (Emphasis supplied).

“(c) Procedure by collector: removal to another district. In case of removal of the taxpayer's office or principal place of business (or residence address, if he has no office or principal place of business) to another collection district, the collector will note the transfer on his Record 10, stating the change of location, and shall then transmit the special tax stamp to the collector for the district to which such office or business was removed. The latter will make an entry on his Record 10, as in the case of an original registration in his district, correct the address on the stamp, if necessary, and note also thereon his name, title, date, and district, and then forward the stamp to the taxpayer.”

SUPREME COURT OF THE UNITED STATES

No. 88.—OCTOBER TERM, 1960.

Thomas D. Clancy, et al., } On Writ of Certiorari to the
Petitioners, } United States Court of Ap-
v. } peals for the Seventh Cir-
United States. } circuit.

[February 27, 1961.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents an important question under 71 Stat. 595, 18 U. S. C. § 3500, the statute sometimes referred to as the Jencks Act as it deals with the problems presented in our decision by that name. *Jencks v. United States*, 353 U. S. 657. Petitioners were charged with making false statements (18 U. S. C. § 1001), with attempting to evade the wagering excise tax (26 U. S. C. § 7201), and with conspiring to defraud the United States of internal revenue taxes (18 U. S. C. § 371). They were found guilty and the judgments of conviction were affirmed. 276 F. 2d 617. The case is here on a writ of certiorari. 363 U. S. 836.

At the trial Minton, a government Agent, testified concerning an interview with petitioner, Kastner, at which he was present. Minton testified "I did not take any notes at the time, but afterwards I returned to the office and made a memorandum of the interview." Counsel for Kastner asked the court for the production of that memorandum pursuant to the Jencks Act.¹

¹ 18 U. S. C. § 3500 provides in relevant part:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the Government shall

Other government witnesses testified to conversations they had had with Clancy, Kastner, and a third partner in petitioners' wagering business. One of the witnesses, Agent Bueschner, testified he had taken no notes during these interviews, but had "compiled a memorandum" from notes taken at the time of the interview by the second witness, Agent Mochel. Both Bueschner and Mochel testified that they had signed the later memoranda of the conversations. Counsel for petitioners requested production of the memoranda, and the requests were refused.

The trial court, though directing delivery to the defense of notes made by the witnesses at the time of the interviews, refused the requests for the memoranda saying that written statements were not covered by the Jencks Act unless they were made "contemporaneously" with the interview. The Government now concedes that this was an erroneous ruling, as indeed it was. Each of these

be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) The term 'statement' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) A written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

statements related "to subject matter as to which the witness has testified." ² Each was a "statement" as that word is defined in the Act. ³ The requirement that it be contemporaneous applies only to "a substantially verbatim recital of an oral statement" made to a government agent. ⁴ By the terms of the Act, ⁵ "A written statement made by said witness and signed or otherwise adopted or approved by him" is also included. These statements fell in that category and should have been produced. *Campbell v. United States*, decided January 23, 1961. And see *United States v. Sheer*, 278 F. 2d 65, 67-68. As the Senate Report on the bill that became the Jencks Act states: ⁶

"The committee believes that legislation would be clearly unconstitutional if it sought to restrict due process. On the contrary, the proposed legislation, as reported, reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial.

"The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with authenticated statements and reports of Government witnesses which relate directly upon his testimony."

The Government, however, contends that as to Agent Minton the error was harmless. It also asserts—though the record is silent and counsel for petitioners deny it—

² 18 U. S. C. § 3500 (b), *supra*, note 1.

³ 18 U. S. C. § 3500 (e), *supra*, note 1.

⁴ 18 U. S. C. § 3500 (e) (2), *supra*, note 1.

⁵ 18 U. S. C. § 3500 (e) (1), *supra*, note 1.

⁶ S. Rep. No. 569, 85th Cong., 1st Sess., p. 2.

that verbatim carbon copies of the reports of Agents Buescher and Mochel were delivered to the defense at the trial. But since its version of what transpired is contested, the Government urges that the most we do is to remand the case to the District Court to determine whether verbatim copies of the reports were delivered to the defense at the trial. If they were so delivered, the Government argues, the court's denial of their production was harmless error.

We do not follow that suggestion. We deal with the record as we find it, which gives no support to the Government's assertion that verbatim reports were delivered to the defense. Moreover, the Government's assertion is not a positive statement of the prosecution. Those who present the case here say with candor that they speak only "according to our information" which admittedly falls short of an assertion that the copies were delivered to the defense at the trial. Since the defense earnestly denies the statement, we can only conclude that on the record before us petitioners were denied an inspection of the documents to which they were entitled.

We put to one side *Rosenberg v. United States*, 360 U. S. 367, where a failure to produce a document was considered to be harmless error under the particular circumstances of that case. We do not reach the harmless error point because, if applicable, it is relevant only to the report of one of the agents, not to those of the other two. Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively. As we said in *Jencks v. United States*, *supra*, 667:

"Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a

different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

Accordingly we conclude that at least as respects some of these statements reversible error was committed and that petitioners are entitled to a new trial. There are other questions raised that we do not reach, as we have no way of knowing whether they will arise on a new trial.

Reversed.

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

Dated June 20th, 19 56

Thomas D. Clancy
(Signature)

Partner

(State whether individual owner, member of firm, or if corporation officer, give title)

SUPREME COURT OF THE UNITED STATES

No. 88.—OCTOBER TERM, 1960.

Thomas D. Clancy, et al.,	On Writ of Certiorari to the
Petitioners,	United States Court of Ap-
v.	peals for the Seventh Cir-
United States.	cuit.

[February 27, 1961.]

MR. JUSTICE CLARK, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN join, dissenting.

Petitioners were convicted of tax evasion and conspiracy to defraud the United States in the operation of a horse race booking enterprise. During the trial the defense asked for the production, under the Jencks Act, of certain signed memoranda of interviews of petitioners by government agents. The request was refused at the time. The Government, in its brief filed November 14, 1960, agrees that this refusal was error. It insists, however, that verbatim copies of the memoranda were delivered to the defense attorneys at a later stage in the trial during the cross-examination of one of the Government's agents. It requested, "unless petitioners agree with the [Government's] version of the facts," a remand of the case in order that the trial court might determine this sole question.

The attorneys for the petitioners made no reply to this claim of the Government until Thursday, January 5, 1961. In their reply brief on that date they categorically denied that verbatim copies had been delivered. This statement was later supported by affidavit of the attorneys.

The case came on for argument on Tuesday, January 10. The Government advised that the government employees involved in the case had not been available until the previous day and hence counter affidavits had not been obtainable. However, it offered to produce affidavits of

the agents, as well as the Assistant United States Attorney who tried the case, that would support its claim. In explaining the situation that confronted it, the government counsel stated that he had personally talked by telephone to the United States Attorney after petitioner's brief was filed. This conversation, he said, together with that had with the Assistant United States Attorney who tried the case, confirmed the earlier conclusion that the Government's contention was correct. However, since both the United States Attorney and his assistant made reference to the Government's witness (Agent Mochel, who had written the memoranda in controversy), government counsel also made every effort to reach Mochel and was successful on January 9. Mochel advised that when he was on the witness stand during the trial he had the carbon copies of his memoranda in his pocket and that upon request he took them out and handed them either (1) directly to petitioners' counsel, or (2) to the Assistant United States Attorney trying the case, who passed them on to petitioners' counsel in the courtroom. This was verified by the Assistant United States Attorney who, however, candidly admitted that he was somewhat "hazy" as to what documents were actually passed by him to counsel. The record indicates that he had made available to petitioners' counsel a large number of documents, including the original notes of the agents. The Government insists that this factual situation creates "sufficient doubt" to require a hearing by the trial judge and a determination of whether or not the memoranda in controversy were actually delivered to petitioners' counsel.

This Court, of course, cannot determine these conflicting factual assertions on an affidavit basis. In view of the lateness of petitioners' denial, however, the Government was not afforded sufficient time to supplement the record on the point. The original record lodged here indicates that Agent Mochel, in his testimony, made ref-

erence to "memoranda" and, in context, the indications are that the "memoranda" in controversy were at that time in the hands of petitioners' counsel, who were questioning him. Under these circumstances it appears to me that justice does require that we remand the case solely for determination of this point. If the verbatim copies were not delivered, no harm will have been done, for the trial court could then set aside the judgments of conviction and grant a new trial. On the other hand, if the copies were actually delivered there could have been no prejudicial error and the judgments of conviction should stand.

The Court, however, refuses to order this done. It reverses the case on this technicality, regardless of the fact that the Government has persuasive evidence that petitioners' counsel actually had access to the very documents on which its reversal is based. The Court indicates that the Government's claim is outside the record. However, if the memoranda were in fact made available, as the Government claims, they were delivered during the trial and the record does have fleeting references that support such a conclusion. It would be a simple matter for these references to be made more complete at a hearing. In my view it is only fair that the Government should be given this opportunity. Moreover, I note that the Court has granted just such relief in many cases. See *Campbell v. United States*, 365 U. S. — (1961); *United States v. Shotwell Mfg. Co.*, 355 U. S. 233 (1957); *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115 (1956).